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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Does a district court deny due process of law when, having permitted amendment of a complaint so as to name as plaintiff the assignee of the original claim, the court in its post-trial decision awards damages on the basis that the amendment asserted an additional claim on the new plaintiff's own behalf--a claim expressly disclaimed by the plaintiff and one on which the defendants had been denied discovery, the ability to assert defenses, and the right to demand a jury trial?

2. May the mere continuation of a business operation by an unrelated legal entity create an identity with the prior owner to serve as the basis for an award of damages under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187?

3. May a plaintiff corporation which voluntarily sells its assets and discontinues its business and does not suffer a diminution of the sale price on account of a defendant's wrongful conduct recover for profits "lost" after the sale?

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ALLIED INTERNATIONAL, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, International Longshoremen's Association, AFL-CIO ("ILA"), and Local 799, International Longshoremen's Association, AFL-CIO, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on March 23, 1987.

Opinions Below

The opinion of the court of appeals is reported at 814 F.2d 32 (1st Cir. 1987) and is reproduced as Appendix A to this petition. The district court's opinion on damages is not reported but is reproduced as Appendix E hereto.

The district court's opinion on liability is reported at 554 F. Supp. 32 (D. Mass. 1982) and is reproduced as Appendix B.[1]

Jurisdiction

The judgment of the court of appeals was entered on March 23, 1987. An order denying rehearing was entered on April 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statute Involved

1. The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . .

2. The Seventh Amendment to the Constitution of the United States provides:

> *Trial by jury in civil cases.*
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, provides in pertinent part:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting com-

[1] References to the appendices will be by page number, "—a".

merce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

Statement of the Case

In response to the Russian invasion of Afghanistan, the ILA in January, 1980 announced a boycott of cargo destined to or from the Soviet Union. The original plaintiff in this action, Allied International, Inc. ("International"), an importer of Russian wood, brought suit under Labor-Management Relations Act § 303, 29 U.S.C. § 187 ("LMRA"), to recover damages from the ILA and its Boston affiliate, Local 799, ILA. The district court dismissed the complaint for failure to state a claim, but the First Circuit, affirmed by this Court, reversed. *Allied International, Inc.* v. *International Longshoremen's Association,* 492 F. Supp. 334 (D. Mass. 1980), *rev'd,* 640 F.2d 1368 (1st Cir. 1981), *aff'd,* 456 U.S. 212 (1982).

On remand, the district court gave collateral estoppel effect to findings of the National Labor Relations Board in a related unfair labor practice proceeding, *International Longshoremen's Association, (Allied International, Inc.),* 257 N.L.R.B. 1075 (1982), *enforced sub nom. Allied International, Inc.* v. *NLRB,* 702 F.2d 1205 (D.C. Cir. 1983), and granted plaintiff partial summary judgment on the issue of liability. *Allied International, Inc.* v. *International Longshoremen's Association,* 554 F. Supp. 32 (D. Mass. 1982). Appendix B, 21a. After a trial on damages the

district court awarded plaintiff $9.1 million, based exclusively on lost profits. Appendix E, 36a.

While the case was pending, International on April 30, 1981 sold its assets to Allied Plywood Corporation ("Plywood"), which had been formed expressly to make the acquisition. The two principal shareholders of International received a 19.9% stock interest in Plywood and continued as employees of the new corporation. The remainder of the Plywood stock, more than 80%, was owned by Zeidlers, Inc., a corporation that had nothing to do with International. 38a. Plywood and International were managed by entirely different directors. International ceased all activity in the Russian wood business but continued in existence through the date of trial. At the sale International assigned its claim in this case to Plywood.

Both during discovery and at trial, the district court prohibited any inquiry as to why International sold its assets.[2] These rulings were based upon the plaintiff's repeated insistence that, since it was not claiming that the boycott had forced the sale or had affected the purchase price and since the Russian trade was only an "infinitesimal" part of the entire transaction, the sale of assets was irrelevant. Because International had voluntarily gone out of business and had suffered no diminution of the sale price on account of the boycott, the ILA claimed that any "loss" of profits which International might have sustained after April 30, 1981 was not proximately caused by the ILA boycott. International, on the other hand,

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[2] $19.2 million of the $23.8 million purchase price was cash, which was retained by International rather than invested in Plywood. Thus, it is clear that the principals of International were selling out of the business rather than seeking an infusion of capital.

maintained that it could recover lost profits after April 30, 1981 as though no sale had ever occurred.[3] *See* 6a, n.3.

A few weeks before the trial was scheduled and at a time when the court had prohibited any new discovery, *see, e.g.*, 32a, International, which had maintained the action in its own name for four and one-half years after the sale, moved in June 1985 to amend the complaint to substitute Plywood as plaintiff. 30a. The district court granted the motion from the bench, stating, "[A]ll it does is change the name of the plaintiffs from Allied International Inc. to Allied Plywood." 30a.

The ILA objected on the grounds that it was unclear whether the amendment merely sought to substitute Plywood as assignee of International's original claim or whether a new claim for damages to Plywood in its own right was being asserted.[4] *Id.* The district court debunked the notion that anything but a perfunctory substitution of the assignee was involved, calling the idea that Plywood might be trying to assert a claim in its own right, "Bananas." 30a. On a motion for reconsideration and clarification, 34a,[5] the plaintiff emphatically stated that

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[3] Allied's expert witness, an economist, calculated and the district court awarded lost profits through January 31, 1984, on the theory that the effects on the Russian wood business continued even after the boycott was over. The district court adopted the economist's exact figure and merely reduced it by 15% so as to disallow lost profits attributable to affiliated distribution companies which had not been named in the complaint.

[4] Since Plywood had entered the Russian wood business in April 1981, it had been subject to the boycott for approximately one month. However, Plywood had never brought suit, and by June 1985 its claim was barred by the 3 year Massachusetts statute of limitations. Mass. Ann. Law Ch. 260 § 2A (Michigan/Law Co-op 1980).

[5] The ILA requested the court to clarify its order permitting amendment and, if the effect was to add a claim in Plywood's own right, to permit the ILA to conduct discovery of the new plaintiff and to allow the ILA to assert defenses which were available only against Plywood, not International. 35a.

only the assigned claim was being asserted, not a second claim in Plywood's own behalf. The motion for reconsideration and clarification was denied without opinion. 34a.

The argument that no new claim was being asserted on Plywood's behalf, which plaintiff continued to press through appeal to the First Circuit, 6a, 7a, is borne out by the amended complaint itself. The amended pleading contains only a single count that does no more than repeat International's original complaint word for word, with only the name of the plaintiff changed. 4a, 5a, 6a.

At trial, Allied's economist used International and Plywood sales and profit figures interchangeably in his equations. Thus, the expert's methodology was to disregard the sale of assets and treat the purchasing and selling corporations as a single entity for purposes of estimating lost profits. While the expert proceeded as though the sale of assets had never occurred, the plaintiff offered no evidence as to how International's "lost profits" after April, 1981 might have been attributable to the ILA boycott, given the facts that the sale was voluntary and that International received full value for its assets. Similarly, the district court, while adopting the economist's quantitative analysis, made no finding on the issue of whether the ILA boycott was the proximate cause of International's lost profits after the sale of assets.

In its post-trial decision, the district court changed gears. Having permitted the amendment prior to trial merely to substitute Plywood as assignee of International's claim, after trial the court found that the amended complaint asserted a claim in Plywood's own right. Despite the absence in the amended complaint of any claim but the one originally asserted by International and despite plaintiff's counsel's representation that the amended pleading as-

serted no more than Plywood's rights as assignee, the district court found that "[B]y the 1985 amendment Allied Plywood Corporation also claimed its own lost profits attributable to the boycott." 38a, 39a. The court held that "the amended complaint properly stated a claim for the lost profits of the International Division of Allied Plywood Corporation as well as for the lost profits of Allied International, Inc." 39a. Plywood's portion of the $9,111,310. judgment amounted to $6,040,740.

Unmindful of the fact that it was permitting recovery on a claim that had never been asserted or tried, the district court treated the matter as a simple application of Fed. R. Civ. P. 15(c), which concerns the relation back of amendments.[6] 39a. Since the original complaint, which

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[6] Even if the district court were correct in proceeding under Rule 15(c), permitting amendment to bring in an entirely new plaintiff with a new claim would have been improper on the eve of trial, after a 4½ year unexplained delay, after summary judgment on liability had been granted, when discovery was foreclosed, and after discovery had actually been denied on issues that would have been relevant to the new claim.

This issue in and of itself warrants review by this Court. The Rules Enabling Act, 28 U.S.C. § 2072, expressly provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." To permit Rule 15(c) to be used to bring in an entirely new plaintiff with a never before asserted claim, which in its own right is barred by the statute of limitations, does affect substantive rights in direct conflict with the Rules Enabling Act. This Court has frequently granted certiorari to resolve questions of interpretation of the federal rules to further "the goal of uniformity of federal procedure." *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965). *See, e.g., Hanna* v. *Plumer*, 380 U.S. 460 (1965) (Rule 4) (service); *Conley* v. *Gibson*, 355 U.S. 41 (1957) (Rule 8) (pleading); *Baker* v. *Gold Seal Liquors*, 417 U.S. 467 (1974) (Rule 13) (counterclaim); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978) (Rule 14) (impleader); *Foman* v. *Davis*, 371 U.S. 178 (1962) (Rule 15) (amendment); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959) (Rule 18) (joinder of claims); *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968) (Rule 19) (joinder of parties); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (Rule 26) (discovery).

had been served prior to the sale of assets, sought damages on behalf of International well into the future, the district court facilely found that the ILA had received "notice" of a claim on behalf of Plywood for its own lost profits after the sale. *Id.*

Having read into the complaint a claim for damages sustained by Plywood in its own right, the district court failed to reach the theory on which the parties had actually tried the case, whether International's profits "lost" after a voluntary cessation of business could be said to have been proximately caused by the boycott.

On appeal, the First Circuit sanctioned the district court's conduct of the case. The court of appeals likewise avoided the issues of permitting recovery on a claim never made and of proximate cause and purported to justify the district court's conduct under Rule 15(c). 7a. Finding that the amended complaint arose out of the same conduct set forth in the original pleading, that there was a sufficient identity of interest between International and Plywood so that the ILA received notice of Plywood's claim, and that there was no prejudice, the court of appeals ruled that the amendment was proper. 14a.

Because of the significant questions raised by this case as to the proper application of the Federal Rules of Civil Procedure, amounting to an unconstitutional denial of due process and of a jury trial, petitioners seek a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Sanctioned a Departure by the District Court From the Accepted and Usual Course of Judicial Proceedings, Amounting to a Constitutional Deprivation, Which Calls for the Exercise of This Court's Power of Supervision.

The mischief in the decisions below is not apparent from a mere reading of the lower courts' opinions. No court is going to state outright that it is deliberately departing from accepted procedure. No court of appeals would hold out as a standard for its lower courts that they should abandon sound judicial practice or should deny due process. Whenever a writ of certiorari is sought on the ground that this Court should exercise its supervisory powers to correct a departure from sound judicial practice, one must look to what the lower courts actually did, not to what they said.

Indeed, reading the opinions below in isolation, one would not realize that anything more than a simple application of Rule 15(c) was involved. The crucial fact, that the district court permitted amendment on one basis before trial and decided the case on a different basis after trial, does not appear in either the district court's opinion or the bland imprimatur of the court of appeals. It is only when the colloquy on the motion to amend, Appendix C, 29a, and the denial of the motion for reconsideration and/or clarification, Appendix D, 34a, are considered that the true course of events becomes known.

What the First Circuit did in fact was to bless a departure from the normal judicial processes so egregious as to deny petitioners their constitutional rights to due process and to a trial by jury. This alone would warrant this

Court's review. In addition, the particular denial of due process that the court of appeals approved was to permit a party to recover on a claim never asserted and expressly renounced, thus conflicting with the decisions of other circuit courts and further warranting review by this Court.

By simply disregarding it, the court of appeals sanctioned the district court's post-trial change in the effect of the amendment of the complaint. The First Circuit's Rule 15(c) analysis treats the propriety of allowing Plywood to assert its own claim as though that claim had been asserted at the time amendment was sought prior to trial. The appellate court failed to come to grips with the fact that the construction of the amended complaint on which relief was granted after trial had been expressly disclaimed by the amending party before trial and, when voiced by ILA's counsel, was treated by the district court as a suggestion bordering on the lunatic. In treating the case as a simple application of "relation back," the court of appeals ignored the fact that what was "bananas" before trial became afterwards a $6 million feast for the plaintiff.

To blind itself to the unconstitutional prejudice to the defendants, the court of appeals was forced to construct a scenario that has no basis in the record. The court found that the defendants were not prejudiced because they were able to present a "fully articulated defense" and because, after leave to amend was granted, defendants never sought discovery and other pre-trial procedures. 11a-14a. These observations all presupposed that the amendment was made well before trial. Strictly speaking that is true. 12a. But to say so is to wrap a lie in the truth. Although the amendment--the single change in the name of the plaintiff--occurred in June, 1985, the *significance* of the amendment was not revealed until 15 months later in the district court's decision of September, 1986. In the meantime, despite the

ILA's request for clarification, the district court was content to rest on its characterization that any notion that the amendment was asserting a claim on Plywood's own behalf was monkey business, and the plaintiff continued, and still continues, to insist that only International's assigned claim was being asserted.

The court of appeals, then, was simply wrong when it found that the ILA could have taken advantage of discovery after the amendment. The record is clear and indisputable that the ILA, in its motion for reconsideration and clarification, asked the district court to grant additional discovery if Plywood was being permitted to assert a claim in its own behalf. 34a. The district court did not permit discovery, then later, after trial, found that it had indeed permitted Plywood to assert its own claim.

The district court's conduct, with the benediction of the court of appeals, prevented the ILA from pursuing and presenting defenses it had against the claim on which the bulk of the recovery was ultimately granted. These included (1) whether Plywood lacked standing to sue under LMRA § 303 both because, unlike International, Plywood was not the owner of the wood longshoremen refused to handle and because, unlike International, Plywood was not a party to the contract for ocean carriage with which the boycott interfered;[7] (2) whether damages from the loss of favorable Russian contracts or from the loss of customers could be recovered by the purchaser when the favorable contracts and the customers had already been lost *before* the sale; (3) whether the price paid by Plywood for the purchase of the assets was ever contemplated to include the Russian trade, since Plywood bought with full knowledge of the boycott and its effects; and (4) whether other

[7] *See Charvet* v. *International Longshoremen's Ass'n*, 736 F.2d 1572 (D.C. Cir. 1984).

divisions of Plywood had experienced increased profits from selling substitute products for Russian wood, which profits offset any losses by the division which marketed the Soviet product, whereas International dealt only in Russian wood and had no non-Russian divisions whose profits might give rise to an offset.

Some evidence with respect to all these issues was available to the ILA but was not introduced because both the plaintiff and the district court had said that only International's claim was at issue. More evidence along the same lines existed but was beyond the ILA's reach, since by June 1985 no new ventures in discovery were permitted.

The important thing is that, while this defensive matter was available against a claim by Plywood, it was *not* available against International. Thus, to say, as did both courts below, that notice from the start of a claim by International going well into the future obviated any prejudice to the ILA is a canard. The defensive material did not depend upon the *time period* for which recovery was sought but upon the *party* on whose behalf it was sought.

Similarly, the court of appeals brushed aside the ILA's claim to have been denied its Seventh Amendment right to a jury trial, saying that the ILA never demanded a jury trial "as to either the first complaint or the amended complaint." 4a, n.2. This is true. But the reason there was no jury demand with respect to the second complaint was that both the plaintiff and the court assured the defendants that the second complaint was no different than the first--a mere substitution of assignee. If that were so, the defendants' election to waive a jury with respect to the original complaint would remain operative. It was only if a new claim on behalf of a new party were being asserted by the amendment that a jury trial on the new issues

could be demanded.[8] Since it was not until after trial that the new claim ever surfaced, the defendants were euchered out of any opportunity to demand a jury.

The district court's pretrial characterization of the amendment as merely permitting substitution of an assignee misled defendants and prevented them from developing and trying defenses available against Plywood in its own right. After both parties had tried the case on one theory, the district court's post-trial alteration of the nature of the amendment so departed from the accepted and usual course of judicial proceedings as to deny defendants their constitutional rights. The judicial bait-and-switch sanctioned by the First Circuit warrants exercise of this Court's supervisory powers.

2. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeals and of the First Circuit Itself.

Review by this Court is all the more called for in that the licensing of the district court's denial of due process and trial by jury is squarely at odds with a rule enunciated by several sister circuits and, until this case, followed by the First Circuit itself.

At least six other circuits hold that recovery may not be had on a claim never asserted. *Sylvan Beach, Inc.* v. *Koch*, 140 F.2d 852, 862 (8th Cir. 1944); *Flannery* v. *Carroll*, 676 F.2d 126, 131 (5th Cir. 1982); *Rosenfeld* v.

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[8] Under Rule 38(d), failure to timely demand a jury trial constitutes a waiver as to all issues raised in the complaint. Where amendment of the complaint raises new issues, the right to demand a jury is revived as to those issues. *See Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1310 (2d Cir. 1973); *see also Auwood* v. *Harry Brandt Booking Office, Inc.*, 100 F.R.D. 804 (D. Conn. 1984); *Ed Brawley, Inc.* v. *Gaffney*, 399 F. Supp. 115, 118 (N.D. Cal. 1975); 5 J. Moore, Moore's Federal Practice, ¶ 38.41 at 32.8.4-32.8.5 (2d Ed. 1974).

Lion Manufacturing Corporation, 253 F.2d 90, 93 (7th Cir. 1958). *See also Coiffe* v. *Morris*, 676 F.2d 539 (11th Cir. 1982); *Monod* v. *Futura, Inc.*, 415 F.2d 1170, 1174-75 (10th Cir. 1969); *Daley* v. *United States*, 243 F.2d 466, 475 (9th Cir.), *cert. denied*, 355 U.S. 832 (1957). Where, as here, there has been an express disclaimer by the plaintiff, the prevailing rule, with which the decision below is equally in conflict, is that relief may not be granted on a theory that has been renounced. *Albemarle Paper Company* v. *Moody*, 422 U.S. 405, 424 (1975). *See also International Harvester Credit Corp.* v. *East Coast Truck*, 547 F.2d 888 (5th Cir. 1977).

Indeed, the First Circuit itself has in the past adhered to the same rule as its sister circuits, *see Convertible Top Replacement Co.* v. *Aro Manufacturing Co., Inc.*, 312 F.2d 52, 58 (1st Cir. 1963), *aff'd in part, rev'd in part on other grounds*, 377 U.S. 476 (1964), and has been expressly approved by this Court on that very point. 377 U.S. 476, 491 n.9.

On the motion to amend, on the motion for reconsideration and/or clarification, and on appeal to the First Circuit, the plaintiff was adamant that the amended complaint did not assert a claim on Plywood's own behalf for profits lost after the sale. The district court's award of damages was predicated precisely on such a claim. The First Circuit's sanctioning of a recovery on a claim not made conflicts with its own precedent and with the decisions of other courts of appeals. This Court should grant review to resolve the conflict among circuits.

3. Subsidiary Holdings of the Court of Appeals Conflict With the Decisions of Other Circuits in Important Areas of Federal Labor Law and Damages.

Once it is seen that the district court's post-trial change of mind deprived petitioners of due process, two subsidiary

questions surface, each of which merits review in its own right. Permitting recovery for profits lost after the sale could be harmless error if the original plaintiff, International, were itself entitled to sue for, and so assign, post-sale damages. Two theories were suggested to justify that position. The court of appeals in the context of Rule 15(c) ruled on the constituent elements of each theory in such a way as would have neutralized the district court's error. In each instance, the First Circuit's resolution of the issue is in conflict with the decisions of other courts of appeals. For complete disposition of this case, then, this Court should resolve these conflicts among the circuits.

A. *Damages After Voluntary Cessation of Business.*

The theory actually profferred by the plaintiff upon which both parties prepared and tried this case was the notion that the original plaintiff, International, could recover for lost profits after the sale of its assets. That position, which the court of appeals calls "appellee's alternative theory," 6a, n.3, would permit two separate and distinct corporations to be fused into a single entity for purposes of damages. It would permit International to recover on its own claim, which was the only claim asserted and the claim assigned to Plywood, damages *after* the voluntary sale and discontinuance of business by International. While purporting to express no opinion, *id.*, the First Circuit, both in its treatment of corporate continuity and by allowing any recovery for profits "lost" after the sale, actually approved plaintiff's theory.

In this respect, the decision below conflicts with three holdings of the Fifth Circuit that a plaintiff which voluntarily ceases business operations and does not suffer a reduced sales price on account of a defendant's wrongful conduct may not recover for lost profits after the sale.

Heatransfer Corp. v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978); *Malcolm* v. *Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981); and *Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). The conflict extends to the decisions of other circuits which have recognized the rule implicitly by noting that the plaintiff *has* been forced out of business by defendant's conduct. *See Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1240-42 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984); *Pierce* v. *Ramsey Winch Co.*, 753 F.2d 416, 429 (5th Cir. 1985); *Farmington Dowel Products Co.* v. *Forster Manufacturing Co.*, 421 F.2d 61, 81 n.46 (1st Cir. 1969); *see also Graphic Products Distributors, Inc.* v. *ITEK Corp.*, 717 F.2d 1560, 1579 (11th Cir. 1983); *Shor-Line Rambler, Inc.* v. *American Motors Sales Corp.*, 543 F.2d 601, 602 (7th Cir. 1976).

This conflict, which extends to actions for damages under all federal laws, presents an important question which should be resolved by the Supreme Court.

B. *Continuity of the "Business".*

The First Circuit attempted to justify the result reached by the district court by treating International and Plywood as a single "enterprise." The appellate court said, "[T]he boycott was the proximate cause of the harm to the enterprise, whosoever the owner may have been." 8a.

In finding for purposes of Rule 15(c) identity between the completely distinct corporations, which existed contemporaneously with different directors and stockholders, the First Circuit enunciated a rule of law in conflict with the decisions of other courts of appeals. The court found an identity between International and Plywood on the

basis not of common ownership or control but of continuity of the business enterprise. The court said,

> The business continued as before under the new ownership and within the new corporate shell. No major operational aspect of the enterprise was altered in consequence of the sale. For the most part, the same employees managed the business from the same locus in much the same way as had theretofore been the case.

6a.

Under the First Circuit's approach, the business venture is elevated to the status of a legal entity, while the corporation, partnership or sole proprietor which owns and operates the business becomes a mere cipher. The case becomes not "International v. ILA" or "Plywood v. ILA," but "the Russian Wood Business v. ILA."

The First Circuit's rule is in head-on conflict with a holding of the 11th Circuit.[9] "In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the *corporate entity* of the seller —*not* whether there is a continuation of the seller's *business* operation." *Bud Antle, Inc.* v. *Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985) (emphasis supplied).

The rule enunciated below also conflicts with several circuits which require a commonality of directors and stockholders and a dissolution of the selling corporations. *Leannais* v. *Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977), *on remand*, 480 F. Supp. 286 (E.D. Wis. 1979); *Acheson* v.

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[9] According legal status to a business operation as opposed to those who carry on the business is difficult to square with the express terms of LMRA § 303, which confers a cause of action on "*whoever* shall be injured *in his* business . . . " 29 U.S.C. § 187(b) (emphasis supplied).

Falstaff Brewing Corp., 523 F.2d 1327 (9th Cir. 1975); *Bud Antle, Inc.* v. *Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985); *Cinocca* v. *Baxter Laboratories, Inc.*, 400 F. Supp. 527 (E.D. Okla. 1975); *West Texas Refining & Development Co.* v. *Commissioner of Internal Revenue*, 68 F.2d 77 (10th Cir. 1933). *See also Kemos, Inc.* v. *Bader*, 545 F.2d 913 (5th Cir. 1977).[10]

Cyr v. *B. Offen & Co. Inc.*, 501 F.2d 1145 (1st Cir. 1974), cited by the Court of Appeals in this regard, 9a, is particularly instructive. *Cyr* was a products liability case and represented a trend in that particular area of the law to disregard corporate distinctions.[11] This exception from the general rule of observing separate corporate identities except in unusual circumstances is relaxed in the area of products liability as a matter of public policy. The purpose is to permit persons injured by defective products to recover by expanding the field of potential defendants and to deter the production and dissemination of unsafe products.

An opposite public policy governs national labor law. Although § 303 was enacted to provide compensation for persons injured by secondary boycotts, this Court has said that the potential for "impairing the effectiveness of unions as collective bargaining agents" must be considered when weighing a proposed theory of damages. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979). Mindful of this, the circuits have

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[10] In *Schiavone* v. *Fortune*, 91 L.Ed.2d 18 (1986) this Court noted but found it unnecessary to adopt the "identity of interest" exception to Rule 15(c).

[11] The First Circuit itself later recognized that *Cyr* was based on compelling and rather unusual facts and "has been viewed as an 'improvisation' on the theme of the 'mere continuation' exception." *Dayton* v. *Peck, Stow & Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984).

been unanimous in limiting the scope of a union's potential liability and holding down the number of potential plaintiffs under § 303, for fear of inhibiting legitimate union activity and frustrating the exercise of rights granted by national labor law. *See W.J. Milner & Co.* v. *International Brotherhood of Electrical Workers, Local 349,* 476 F.2d 8 (5th Cir. 1973); *Fulton* v. *Plumbers & Steamfitters,* 695 F.2d 402 (9th Cir. 1982), *cert. denied,* 464 U.S. 913 (1983); *Charvet* v. *International Longshoremen's Association,* 736 F.2d 1572 (D.C. Cir. 1984).

Since it is not always possible to know in advance which conduct will be held to constitute a secondary boycott,[12] the possibility of Draconian penalties or a multitude of potential claimants must give pause to a union in deciding how best to represent its members.

To transpose a products liability approach to a labor law context would be to reverse a longstanding and well recognized policy. It would expand the number of potential plaintiffs with an inevitable chilling effect on the exercise of legitimate union activity. The need for review by this Court of the First Circuit's conflict with other courts of appeals is accentuated by the far-reaching ramifications for national labor law.

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[12] Until this Court ruled in this case, a majority of jurists, including a unanimous panel of the Fifth Circuit and one judge on the First Circuit, agreed with the ILA that the refusal to handle Russian products was not a secondary boycott. See *Baldovin* v. *International Longshoremen's Ass'n,* 626 F.2d 445 (5th Cir. 1980), *Allied,* 640 F.2d at 1382-83 (1st Cir. 1981), (Aldrich, J., dissenting).

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the First Circuit in this case.

Dated: May 21, 1987

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1947

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant-Appellant.

No. 86-1987

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.,

Defendants-Appellees.

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U.S. District Judge*]

Opinion of United States Court of Appeals

Before

Campbell, *Chief Judge*,
Aldrich and Selya, *Circuit Judges*.

Ernest L. Mathews, Jr. with whom *Thomas W. Gleason*, *Kevin Marrinan*, and *Maura R. Cahill* were on brief for International Longshoremen's Association, AFL-CIO.

Joseph T. Doyle, Lecomte, Barber, Emanuelson, Tick & Doyle, Charles R. Goldburg and *Diana Graham* on brief for Local 799, International Longshoremen's Association, AFL-CIO.

Danielle E. DeBenedictis with whom *Michael T. Cetrone*, *Stephen J. Brake, Jennifer A. Parks, Valerie C. Samuels*, and *Nutter, McClennen & Fish* were on brief for Allied International, Inc.

March 23, 1987

SELYA, *Circuit Judge*. This litigation has occupied the attention of an assortment of tribunals (including our own) for several years. In this, the latest chapter of what has become an enduring saga, the International Longshoremen's Association (ILA) and its Boston-based affiliate (Local 799) appeal from a judgment of the United States District Court for the District of Massachusetts awarding substantial money damages in favor of Allied Plywood Corporation (APC). The defendants-appellants will be sometimes collectively referred to herein as "the union."

We briefly review the tortuous procedural history of this case. Following the onset of the union's boycott of Russian

goods (described *post*), APC's predecessor-in-interest, Allied International, Inc. (Allin), brought suit against the present appellants, but without immediate avail. Allin's complaint under 29 U.S.C. § 158(b)(4)(i)[1] was dismissed by the district court for failure to state a cognizable claim. *See Allied Int'l, Inc.* v. *International Longshoremen's Ass'n,* 492 F. Supp. 334 (D. Mass. 1980). We reversed, ordering the matter reinstated. *Allied Int'l, Inc.* v. *International Longshoremen's Ass'n,* 640 F.2d 1368 (1st Cir. 1981). On certiorari, the Supreme Court affirmed our ruling, holding that the complaint stated a cause of action. *International Longshoremen's Ass'n* v. *Allied Int'l, Inc.,* 456 U.S. 212 (1982). While this skirmishing was ongoing, Allin filed a remonstrance before the National Labor Relations Board (NLRB) arising out of the same factual mosaic. The NLRB, *see International Longshoremen's Ass'n,* 257 N.L.R.B. 1075 (1981), found that the interdicted conduct constituted an unfair labor practice in violation of 29 U.S.C. § 158(b)(4)(i), quoted *ante* n.1.

These proceedings, collectively, formed the basis for the continued pursuit by Allin of its claims against the union. The district court subsequently found both the ILA and Local 799 liable, and granted partial summary judgment to that effect. *Allied Int'l, Inc.* v. *International Longshoremen's Assn,* 554 F. Supp. 32 (D. Mass. 1982). Thereafter,

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[1] 29 U.S.C. § 158(b)(4)(i) provides in substance:

(b) It shall be an unfair labor practice for a labor organization or its agents . . .

* * *

(4)(i) to engage in, or to induce or encourage any individual . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . . .

before any trial on damages, Allin moved to amend the complaint to substitute APC as the named plaintiff. That motion was granted over objection.

No party interposed a timely demand for empanelling of a jury. Fed. R. Civ. P. 38(b).[2] At the ensuing bench trial, the district court held, *inter alia,* that damages in the nature of lost profits were recoverable, and that, on the evidence presented, lost profits were ascertainable with a reasonable degree of certainty through January 31, 1984. *Allied Plywood Corp.* v. *International Longshoremen's Ass'n,* 123 L.R.R.M. (BNA) 2455, 2458 (D. Mass. 1986). Finding the plaintiff's proven damages (including but not limited to lost profits) to be in the sum of $8,055,490, *id.* at 2460, the court entered judgment for that amount, plus prejudgment interest. *Id.* These appeals followed.

Liability is not in dispute at this stage. And, although the appellants have served up a bouillabaisse of arguments as to damages, many of their asseverations are so bereft of substance that we need not savor them at any length. We will discuss only those assignments of error which provide some food for serious thought.

I.

The union's flagship contention is that the trial judge erred in permitting amendment of the complaint. The appellee first moved to amend on June 12, 1985. The amendment was narrow: it sought only to change the party

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[2] We need not discuss the appellants' beseechment that they were deprived of their right to a jury trial on the "new" claim asserted by the amended complaint. The long and short of it is that they never served "a demand therefor in writing" within the time allotted in Rule 38(b)—or thereafter, for that matter—as to either the first complaint or the amended complaint.

plaintiff. The appellants argue that this added an entirely new claim to the case—the claim for APC's lost profits. This new claim, the union's thesis runs, was time-barred when initially asserted, *see* M.G.L. c. 260, § 2A (three year statute of limitations for actions in tort), and should not have been allowed.

We must set this aspect of the matter into perspective. Allin began importing wood products from the U.S.S.R. over a decade ago. On January 9, 1980, the ILA flexed its political muscle and declared a boycott of all Russian cargo entering at United States ports. Its edict called for "immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers" were responsible for offloading. Union members, by and large, followed the ILA's lead with the same enthusiasm as the Irish citizenry displayed in ostracizing the English land agent, Captain Charles C. Boycott (the man whose name has come to be synonymous with concerted refusals to deal). Local 799 was a willing—indeed, eager—participant in this effort.

When the union mounted the boycott in 1980, Allin was actively engaged in the business of importing and distributing Russian lumber products. APC had not yet appeared on the horizon. Contending that its business had been, and was being, ravaged by the boycott, Allin brought the instant suit on March 28, 1980. Some thirteen months later, all of the assets of Allin were sold to APC, an unrelated corporation. As part of this transaction, Allin assigned its claims against the union to APC in their entirety. On the record before us, the conclusion is inescapable that all of the material facts concerning the assignment, the sale of the assets of Allin to APC, and the overall method and manner in which the latter thereafter ran the shop, were known to the defendants.

The business continued as before under the new ownership and within the new corporate shell. No major operational aspect of the enterprise was altered in consequence of the sale. For the most part, the same employees managed the business from the same locus in much the same way as had theretofore been the case. Meantime, the ILA, its zeal unabated, remained intransigent. The boycott endured for some weeks past the date of sale. Though the hands-off policy was interrupted at certain times and in certain ports by, for example, judicial injunctions, the ILA did not rescind its orders concerning Russian cargo until June of 1981.

The litigation between the distributor and the union proceeded after the sale as it had before. It was not until June 12, 1985 (some four months prior to the start of trial) that the district court granted a motion to amend the complaint to substitute APC as the party plaintiff. The revision was nominal in the most literal sense of the word: the amended complaint restated verbatim the factual averments and prayers for relief contained in the original complaint which Allin had filed; the only change was to delete the references to Allin *qua* plaintiff and to insert in their place references to APC.

Although the matter is not free from doubt,[3] we assume arguendo that the effect of amending the complaint was,

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[3] The appellee has argued that as the purchaser of the business and assets of Allin and as its assignee anent damages, APC was making no "new" claim when it became the named plaintiff in its own right. As APC sees things, it was merely continuing to assert the claims originally made by Allin; the case involves a single undammed stream of harm, the essential characteristics of which were totally unaffected by the change in ownership of the business. Because we find no preclusion of the suit even if two separate claims are involved, *see* text *post*, we express no opinion on the appellee's alternative theory.

as the union contends, to add a new claim for APC's boycott-related lost profits. The parties—who agree on little else—concur in their assessment that M.G.L. c. 260, § 2A controlled, and that the applicable limitations period was three years from the time the cause of action accrued. Inasmuch as any neoteric claim asserted by APC arose out of the unlawful boycott which ended in June 1981, such a claim would have been time-barred unless, under Fed. R. Civ. P. 15(c), it related back to the date when the suit was first started.

We look initially to Rule 15(c) itself. The rule provides in pertinent part that:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Fed. R. Civ. P. 15(c).

Although the relation back of amendments switching plaintiffs—as opposed to defendants—is not explicitly treated in Rule 15(c), "the attitude taken in [the rule]

toward change of defendants extends by analogy to amendments changing plaintiffs." Fed. R. Civ. P. 15(c) advisory committee note. Thus, when revision of a complaint has the effect of substituting a fresh plaintiff for the original one, three requirements must be met if the former's claim is different and is to relate back: the amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent. *See Raynor Bros.* v. *American Cyanamid Co.*, 695 F.2d 382, 384-85 (9th Cir. 1982); *Staren* v. *American Nat'l Bank and Trust Co.*, 529 F.2d 1257, 1263 (7th Cir. 1976); *Unilever (Raw Materials) Ltd.* v. *M/T Stolt Boel*, 77 F.R.D. 384, 390-91 (S.D.N.Y. 1977). *See also* 3 J. Moore, *Moore's Federal Practice* ¶ 15.15 [4.-2] (2d ed. 1984). We examine each of these factors in turn.

In this case, it is clear beyond peradventure that APC's claim for its lost profits depended upon exactly the same facts as were set out in the original complaint. Indeed, other than the change in the plaintiff's identity, no new allegations were made. The conduct complained of was precisely the same: the illegal boycott which had begun in 1980 and which had continued, albeit in fits and starts, until after the sale of the business. The boycott was the proximate cause of the harm to the enterprise, whosoever the owner may have been. The liability issue, as to which summary judgment had been granted before the switch of parties was effected, *see* 554 F. Supp. 32, was identical vis-a-vis the "old" and the "new" claims. There was no

qualitative difference between the claims, merely a temporal one: the "new" claim for lost profits related to a later time period, but nonetheless depended upon the effects of the earlier conduct—the very conduct that sparked the original suit. Indisputably, Allin's claim for boycott-related damages (of which APC was the assignee) and APC's claim for such damages in its own right, grew out of precisely the same nucleus of operative facts. The seeds of both blossoms were sown in a single planting.

Next, there was evidence of a sufficient identity of interest between Allin and APC to warrant invocation of the prophylaxis of Rule 15(c). After all, APC purchased all of the assets of Allin and continued to operate the affected business after the sale in the same manner as before. In the process, APC acquired Allin's claims—past, present, and future—against the union. On the record before the district court, there was an ample basis for a finding of identity of interest. *Cf. Abreen Corp.* v. *Laborers' Int'l Union*, 709 F.2d 748, 753 (1st Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (where all assets and rights affected by the litigation were transferred to the current party, the difference in legal entities is unimportant to the case); *Cyr* v. *B. Offen & Co.*, 501 F.2d 1145, 1154 (1st Cir. 1974) (where there is overall continuity in the operation of a business, products liability can be imposed on a successor corporation which did not exist on the date of manufacture). And, as has been highlighted by our discussion of the way in which the two causes of action arose out of the same conduct and occurrences, *see ante*, there was a close relationship between the claims themselves. One can plausibly view Allin's lost profits and APC's lost profits as two halves of a single semester in the school of hard knocks.

We are in full agreement with the district court that the union was on clear notice of *all* of the actual claims from the inception of the suit. From the very start, lost profits had been claimed without limit of time. Indeed, the original complaint told the defendants that substantial damages had been incurred, that damages were continuing to mount, and that future damages in large dollar mounts were in the offing. By way of illustration, both the original and the amended complaints contained the following (identical) averment:

> As a result of the aforesaid conduct of defendant ILA and defendant Local 799, [the plaintiff] has been damaged in the amount of $5 million dollars to date and faces prospective damages of upwards of $10 million dollars.

Complaints (original and amended) at ¶ 49.

By means of such statements in the original complaint and in the early days of pretrial discovery, the defendants were fairly apprised, well within the applicable limitations period, that the thrust of the litigation was to hold them responsible for all damages sustained by the importation and distribution business in consequence of the continuing refusal to offload. The complaint, by its terms and tenor, made no distinction as to *when* those damages had been, or might be, incurred. If the defendants drew a contrary conclusion (a supposition which the district court had difficulty in swallowing, *see* 123 L.R.R.M. at 2456), they acted without a reasonable basis—and thus, at their peril. And, having learned contemporaneously of the sale of the business, the union had every reason to believe that APC, in its own right, would be seeking to recover whatever damages were attributable to the post-sale period.

The final leg of the Rule 15(c) journey involves questions of fundamental fairness. The trial judge, in allowing the motion, found no cognizable prejudice. We review his determination in this respect only for abuse of discretion. *Foman* v. *Davis,* 371 U.S. 178, 182 (1962). Having done so, we conclude that no error was committed.

We have painstakingly perused the record, and find no credible hint of the prejudice of which the union now complains. As we have previously mentioned, the defendants were on notice of the full extent of their potential liability from the earliest stages of the litigation. They had a protracted period within which to conduct their discovery. They utilized this period generously. Once the complaint had been amended to bring in APC, approximately four months elapsed before the start of trial. There was abundant time, even then, within which to carry out supplementary discovery if the nominal revision to the pleadings legitimately dictated further inquiry. Yet, the appellants did not lift a finger. They did not move for postponement of the trial. They asked for no adjournment or continuance during trial in order to meet what they now characterize as a "new" claim. They have no basis to contend that evidence disappeared with the passage of time. Any claim of prejudice under such circumstances is necessarily a feeble one. *See Hill* v. *BASF Wyandotte Corp.,* 782 F.2d 1212, 1213-14 (4th Cir. 1986) (no undue prejudice where defendants aware long before trial of the nature of the claim and of the parties in interest); *Goldenburg* v. *World Wide Shippers and Movers,* 236 F.2d 198, 200-01 (7th Cir. 1956) (no prejudice where amendment increased the amount of damages, but did not change a single issue in the case and defendant had ample time to discover specific damages claimed).

The sockdolager, if one is required, is simply this: discovery was still open—and ongoing—when the district court permitted amendment of the complaint. As the district judge perspicaciously observed, even "[i]f the defendant was led to believe to its prejudice that only the lost profits up to the point of sale were claimed, such prejudice was obviated by the time that elapsed between the amendment and the actual beginning of the trial." 123 L.R.R.M. at 2456. Certainly, at the time of the amendment, or within a few weeks thereafter, the union knew beyond the shadow of a doubt the full ramifications of the claim which APC was asserting. In early July of 1985—while discovery was still open and some months before the start of the trial—APC supplemented its answers to interrogatories and laid out the details of its claim in substantially the fashion that it subsequently attempted to prove those damages at trial. The filing set forth a detailed exposition of actual lost profits and out-of-pocket costs incurred to 1985, and an exegetic account of projected losses thereafter (through 1989). Armed with such knowledge, the defendants remained inert. We take this as a plain indication that, as they saw it, they needed to do nothing further to prepare their case.

The absence of prejudice was matched by the absence of surprise. The district judge observed that the union "presented a fully articulated defense with respect to the entire period claimed," 123 L.R.R.M. at 2456, including the period from the date of sale forward. The record bears true witness to this conclusion. The appellants' current claim that, notwithstanding the expansive language of the complaint, they were somehow lulled into believing that the plaintiff was pressing a claim only for profits to the date of the sale rings hollow in the face of such a finding.

The shortest answer to the "surprise" contention, of course, is that if the union did assume that only a closed period of damages was being pursued, the assumption was a totally unreasonable one. The slightly longer—but no less definitive—answer is that pretrial discovery plainly pointed to a diametrically opposite conclusion. We need not detail all the indicia which our inspection of the record has revealed, though we have set out a representative sampling in the margin.[4] It suffices to say that not even the most sanguine litigant, faced with such adversarial contentions and mindful of the claims limned in both the original and the amended complaints, could reasonably have deduced that no damages were being sought beyond April 1981.

To this moment, the appellants have failed to specify a single relevant item of discovery which they both needed to meet the amendment and were precluded from getting by time constraints or otherwise. Perfervid rhetoric notwithstanding, there was no unfairness here. APC's claim "arose out of the conduct . . . set forth in the original pleading," Fed. R. Civ. P. 15(c); the defendants, within

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[4] Computer printouts produced by the plaintiff in early 1983 (in response to a Rule 34 demand) detailed sales and gross profits on the Russian wood business, by customer and by time interval, well past the date of the transfer of ownership. Interrogatory answers filed in mid-1983 computed damages into 1983, and advised that further compilations were ongoing. In responses to the ILA's second set of interrogatories, served September 28, 1983, the defendants were told that the plaintiff would attempt to introduce testimony on "pre-boycott projections (through 1986) for growth in Allied's sales and profits," and as to "the amount of sales and profits which Allied would have made during the boycott and post-boycott years, projected through 1986, . . . [as contrasted with] the actual amount of sales and profits made by Allied during the boycott and post-boycott years, projected through 1986."

the limitations period, had "received such notice" of the claim that they were not "prejudiced in maintaining [their] defense on the merits," *id;* and the defendants should have known that, as to the claim for damages accruing after the sale of the business and Allin's assignment of its chose in action to APC, the suit should be maintained in the latter's name. There is ample record support for the lower court's finding that the appellants were on fair and timely notice of APC's "new" claim, and were neither prejudiced nor surprised thereby. The disputed claim thus related back to the date the litigation started, Fed. R. Civ. P. 15(c), thereby averting the proffered limitations defense.

Even on the appellants' "two-claim" hypothesis, *see ante* n.3, the asseveration that the motion to amend was improvidently allowed comprises much cry and little wool. The district court did not abuse its discretion in permitting APC to be substituted as the party plaintiff.

II.

A plaintiff in a § 303 suit[5] has a duty to minimize damages if it is reasonably possible to do so. *Vulcan Materials Co.* v. *United Steelworkers of Am.,* 430 F.2d 446, 458 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971). The appro-

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[5] Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, provides, in pertinent part, that:

> (a) It shall be unlawful, for the purpose of this section only . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

priateness of efforts to rehabilitate and cure must be evaluated under the totality of the circumstances which pertain in each individual case. *Eazor Express, Inc.* v. *International Bhd. of Teamsters,* 520 F.2d 951, 969 (3d Cir. 1975), *cert. denied,* 424 U.S. 935 (1976). Inasmuch as the possibility of mitigation is in the nature of an affirmative defense, it is the defendants who bear the burden of proving by a fair preponderance that an injured party failed to take reasonable steps to hold down its losses. *Tennessee Valley Sand & Gravel Co.* v. *M/V Delta,* 598 F.2d 930, 933 (5th Cir. 1979).

Whether or not damages in a § 303 action have been kept to a respectable minimum is a classic question of fact. *International Longshoremen's & Warehousemen's Union* v. *Hawaiian Pineapple Co.,* 226 F.2d 875, 880-81 (9th Cir. 1955), *cert. denied,* 351 U.S. 963 (1956). Thus, a finding that a claimant acted reasonably to keep its damages low can be set aside on appeal only if clearly erroneous. *Marcoux* v. *Maine,* 797 F.2d 1100, 1106 (1st Cir. 1986). Findings of fact will be sustained so long as they represent plausible interpretations of the record as a whole. *Id.*

In this case, the appellants have failed to persuade us that error was committed on this score. An entire series of minimization endeavors are abundantly documented. The appellee made prudent use of the port of Montreal as an alternative site for importation when feasible, made extensive inquiries to determine whether vessels carrying Russian cargo could be unloaded at various ports and at various times, exercised due diligence in checking port availability along the east and gulf coasts, and attempted in vain to gain assurances from Thomas Gleason, the ILA's president, that its cargos could be unloaded. It comes with an aura of ill grace that the union, which did its level

best to obstruct the plaintiff's efforts to bring in Russian wood products, now protests that the plaintiff is somehow to be faulted because it was not ingenious enough to elude the reach of the union's boycott.

The ILA also argues that its boycott was "porous," meaning that several southern ports began handling Russian cargos before the boycott officially ended. In the appellants' view, the plaintiff had a duty continuously to monitor the goods actually entering each port, and then to arrange for shipment to a place where Russian cargo might be welcomed. That view is myopic, to say the least. As the district judge found, information about the reopening of certain ports was not generally known at the times in question. 123 L.R.R.M. at 2457. When reopenings transpired, they were sporadic and somewhat vagarious. *Id.* The plainitff was only under a duty to take reasonable steps to palliate damages, not to use supernormal efforts or to take extraordinary financial risks. Since preparations for a shipment of Russian cargo required months of lead time and costly advance commitments, it would have been impractical to launch a shipment on the gamble that, despite the ILA's pronouncements of a continuing boycott, the shipment could perhaps be unloaded weeks later when it reached a southern port.

The appellee was not under any duty to take outlandish chances in order to mitigate its damages. *See R.E.B., Inc.* v. *Ralston Purina Co.*, 525 F.2d 749, 755-56 (10th Cir. 1975). A labor organization cannot engage in an illegal secondary boycott, announce that the boycott persists, and expect the injured party nonetheless to stand the hazard in the hope that the union's boasts are empty. We agree with the Fifth Circuit:

> The Union cannot have it both ways; it cannot engage in unlawful secondary activity designed to shut down an industrial operation and then claim that the plant should have been operated during the strike to minimize damages.

Vulcan Materials, 430 F.2d at 458.

III.

The appellants argue that the district court's calculation of lost profits, relying in part on the testimony of APC's expert witness (Dr. Kendall), was erroneous as a matter of law. They view the Kendall evidence as an unmitigated disaster: faulty data, flawed assumptions, and the use of a discredited mathematical methodology.

It is axiomatic that the failure to object at trial, absent exceptional circumstances not present here, forecloses any opportunity to challenge the admissibility of the evidence on appeal. *See* Fed. R. Evid. 103(a)(1) ("Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, ..."). *See also Morrow* v. *Greyhound Lines, Inc.,* 541 F.2d 713, 724 (8th Cir. 1976); *Local 901, International Bhd. of Teamsters* v. *Compton,* 291 F.2d 793, 796-97 (1st Cir. 1961). Our review of the nisi prius roll indicates that the defendants in no way preserved the testimonial objections which they now urge upon this court. Their failure so to do comprises a waiver of any right to raise such issues on appeal.

Even if we were prepared to overlook this procedural default—and there is no readily apparent reason why we should—it would avail the union naught. A trial judge has

wide discretion anent the admission and exclusion of expert testimony, and his decisions are to be sustained unless his discretion has been abused. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States* v. *Wilson*, 798 F.2d 509, 517 (1st Cir. 1986); *United States* v. *Fosher*, 590 F.2d 381, 382 (1st Cir. 1979). We have scanned the transcript of Dr. Kendall's testimony, including opposing counsel's vigorous cross-examination of him, in sufficient detail to satisfy ourselves that the district court acted well within its proper province in admitting the interdicted testimony into evidence. It was likewise permissible for the judge, as the finder of the facts in this bench trial, to determine the weight and value to be accorded to Dr. Kendall's views. The appellants' contrary notion reflects a gross miscalculation on their part.

IV.

We have considered all of the other assignments of error and find them to be meritless. Only one requires discussion. That last assertion is Local 799's contention that, irrespective of the ILA's culpability, it was error to hold the Local responsible for the full amount of the appellee's damages.

Without a doubt, Local 799 participated in the boycott pursuant to the directive issued by the ILA. Clearly, its activities prevented the plaintiff from bringing Russian wood products into the port of Boston for some appreciable period of time. But, this tea party extended well beyond the Commonwealth. And, as an active participant in an illegal secondary boycott, Local 799 became jointly and severally liable with its international parent (the prime sponsor of the boycott) for *all* damages flowing from the unlawful scheme, wheresoever originating. It is no defense

to the Local to say that it should only be held accountable for the damages related to the lawless closing of Boston's harbor to these imports.

A violation of § 303 is a tort, in the nature of interference with advantageous economic relations. *See, e.g., Associated Imports, Inc.* v. *International Longshoremen's Ass'n*, 609 F. Supp. 595, 600 (S.D.N.Y. 1985) (a secondary boycott "is an interference by one party with the contractual relations of two others.").[6] In point of fact, the appellants—by their assertion of a limitations defense premised on M.G.L. c. 260, § 2A, *see ante* Part I—have conceded as much. It is apodictic that joint tortfeasors are jointly and severally liable in a § 303 action. *Abreen Corp.*, 709 F.2d at 757; *International Union of Operating Engineers, Local 653* v. *Bay City Erection Co.*, 300 F.2d 270, 271-72 (5th Cir. 1962).

Local 799 was plainly acting in concert with the ILA. It associated itself with the outlawed activity as a willing participant. It was, in short, a joint tortfeasor. Local 799 thereby became liable for the entire amount of the boycott-related damages, even if the amount directly attributable to the Local's conduct was but a fraction of the whole. *Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *see also Wainwright* v. *Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); *cf. United States*

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[6] *Associated Imports* involved a fact situation virtually identical to that at bar. The plaintiff, an importer of Soviet glass products, brought a § 303 action against the ILA arising out of its refusal to unload goods during the 1980-81 boycott. The court analyzed the nature of a § 303 suit to determine the most analogous state law cause of action for the purpose of applying the appropriate statute of limitations, and settled upon tortious interference. *Associated Imports*, 609 F. Supp. at 599-600. *See also Park Electric Co.* v. *International Bhd. of Electrical Workers, Local 701*, 593 F. Supp. 1060, 1064 (N.D. Ill. 1984) (similar).

v. *Baines,* No. 86-1799, slip op. at 3-4 (1st Cir. Mar. 2, 1987) ("[A] conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight. . . ."). Having elected to become an active player in a national boycott game, Local 799 cannot retreat into its small corner of New England when the score is tallied.

V.

In fine, the record reflects that the district court did not abuse its discretion in allowing the complaint to be amended to name APC as the party plaintiff.[7] Thereafter, the ILA and Local 799 received a full and fair trial on the issue of damages. We find no substantial error in the course or conduct of that trial. The assignments of error lodged in these appeals are uniformly unavailing. The award of damages against the appellants, jointly and severally, is unimpugnable.

The judgment of the district court is
Affirmed.

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[7] On March 31, 1986, after the trial on damages had been completed but before the district court had issued its rescript, APC Liquidating Trust was substituted for APC as the party plaintiff. This further mutation is of no consequence to the disposition of the appeals, so we have ignored it.

APPENDIX B

Memorandum and Order of United States District Court

UNITED STATES DISTRICT COURT

D. MASSACHUSETTS

Civ. A. No. 80-584-S

ALLIED INTERNATIONAL, INC.,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.

Oct. 1, 1982

MEMORANDUM AND ORDER

SKINNER, District Judge.

Plaintiff Allied International, Inc. ("Allied") brings this action under section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187 against the International Longshoremen's Association (the "ILA") and its local unions for their refusal to unload ships engaged in trade with the U.S.S.R. Allied is an importer of wood products from the Soviet Union. Following a directive issued by ILA President Thomas Gleason on January 9, 1980, defendants commenced a nationwide boycott of Soviet goods in response to the Soviet invasion of Afghanistan and refused to unload the wood imported by the plaintiff. The boycott lasted into the spring of 1981. Plaintiff asserts

that this conduct constitutes an illegal secondary boycott under § 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). Plaintiff has moved for a summary judgment with respect to the issue of liability and for a protective order to stay discovery until disposition of the summary judgment motion. For the reasons which follow, the motion for partial summary judgment is granted. The motion for a protective order is denied because the summary judgment motion is disposed of herewith.

The underlying facts of this case have been fully set forth in various opinions dealing with earlier phases of this litigation. *International Longshoremen's Association* v. *Allied International, Inc.*, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982); *Allied International, Inc.* v. *International Longshoremen's Association,* 640 F.2d 1368 (1st Cir. 1981) and *Allied International, Inc.* v. *International Longshoremen's Association,* 492 F.Supp. 334 (D.Mass.1980). *See also, Walsh* v. *International Longshoremen's Association,* 630 F.2d 864 (1st Cir.1980); *Walsh* v. *International Longshoremen's Association,* 488 F.Supp. 524 (D.Mass. 1980). For present purposes it is sufficient to outline the recent procedural history. On April 20, 1982, the United States Supreme Court held that Allied's complaint against the ILA stated a cause of action under § 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). This court had dismissed plaintiff's § 8(b)(4)(B) claim as insufficient as a matter of law. The Court of Appeals reversed this decision and the Supreme Court affirmed the holding of the Court of Appeals. During these proceedings, Allied also brought a complaint against the ILA before the National Labor Relations Board ("NLRB") alleging that the ILA's boycott of Soviet goods was an unfair labor practice in violation of § 8(b)(4)(B). The NLRB found

in favor of Allied and issued a cease and desist order against the ILA. *International Longshoremen's Association and Allied International, Inc.*, 257 NLRB No. 151 (August 28, 1981).

In this motion for a summary judgment, plaintiff must prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Plaintiff has met both of these requirements.

Little dispute about material facts exists on the record of this case. From the affidavits submitted, it appears that the only real matter in dispute relevant to the issue of liability is the availability of nonunion labor to handle Allied's cargo. It is undisputed that the union refused to handle Russian goods nationwide in response to the January 9, 1980 directive from ILA President Gleason. It is also undisputed that these goods included wood products imported by Allied from the U.S.S.R.

The defendants are precluded from raising the one disputed issue by the prior binding adjudication of the NLRB. It is well settled that the factual findings of an Administrative Law Judge are entitled to collateral estoppel effect when the parties have had a full and fair opportunity to litigate before the agency. *United States* v. *Utah Construction Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1965). Indeed, there is ample authority for applying collateral estoppel to cases in this precise posture, i.e., where one party seeks a partial summary judgment in an action under § 303 and where the NLRB has previously decided whether the conduct in question constitutes an unfair labor practice under § 8(b)(4)(B). *International Wire* v. *Local 38, International Brotherhood of Electrical Workers*, 475

F.2d 1078 (6th Cir.1973), *cert. den.* 414 U.S. 867, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973), *Texaco, Inc.* v. *Operative Plasterers and Cement Masons International Union,* 472 F.2d 594 (5th Cir.1973), *cert. den.* 414 U.S. 1091, 94 S.Ct. 721, 38 L.Ed.2d 548 (1973), *Paramount Transport Systems* v. *Chauffeurs Teamsters & Helpers Local 150,* 436 F.2d 1064 (9th Cir.1971), *H.L. Robertson & Associates* v. *Plumbers Local Union No. 519,* 429 F.2d 520 (5th Cir.1970), *Jaden Electrical Co.* v. *International Brotherhood of Electrical Workers,* 508 F.Supp. 983 (D.N.J.1981). "It is no longer controversial that parties to an unfair labor practice proceeding may be estopped to relitigate issues finally determined therein in a later 303(b) action." *Seco, Inc.* v. *Local 135 Laborers International Union,* 494 F.Supp. 168, 170 (E.D.Pa.1980).

The principles of collateral estoppel are clearly applicable to the present case. Both parties have had a full and fair opportunity to litigate the same factual issues before an Administrative Law Judge ("ALJ") and before the NLRB. Defendants have made no assertion to the contrary. Represented by counsel, both parties submitted briefs and participated in two days of hearings before the ALJ. The ALJ made detailed findings of facts, passing on the credibility of witnesses, and the ILA submitted exceptions to certain of the findings. After having "carefully examined the record," the NLRB adopted the ALJ's findings of fact in full. 257 NLRB No. 151 at 2. Although the NLRB disagreed with the ALJ on certain legal issues, this disagreement did not extend to the factual issues which were explicitly adopted. *Id.* The NLRB's decision was a final judgment. Although the defendants have appealed the decision to the Court of Appeals, it presently stands

as a final judgment for purposes of collateral estoppel.[1] *Barnes* v. *Oody,* 514 F.Supp. 23 (E.D.Tenn.1981). *See also Taunton Gardens Co.* v. *Hills,* 557 F.2d 877, 879 n. 2 (1st Cir.1977); *Kurek* v. *Pleasure Driveway and Park District of Peoria, Illinois,* 557 F.2d 580, 595 (7th Cir.1977) *cert. den.* 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979).

The NLRB decided all the factual questions material to the issue of whether the ILA violated § 8(b)(4)(B) including the question of the availability of nonunion labor to handle Allied's cargo. See 257 NLRB No. 151 at 30, 32-3, 35-6. It found that although an incomplete gang may be filled in with some nonunion men ("scalawags"), a trained, completely nonunion gang could not be hired to unload a vessel. 257 NLRB No. 151 at 5. ". . . [D]ue to their experience on the docks, scalawags refuse to work ships when the ILA engages in a work stoppage of any kind". *Id.*

Thus, by application of the doctrine of collateral estoppel, no material facts remain in dispute. The § 303 liability at issue in this case is established by proof of a violation of § 8(b)(4)(B), and the essential facts pertaining to § 8(b)(4)(B) liability have already been litigated.

Allied is also entitled to a summary judgment on the liability issue as a matter of law. *International Longshoremen's Association* v. *Allied International, Inc.,* 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982). The Supreme Court stated that:

> [t]he secondary boycott provisions in § 8(b)(4)(B) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to

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[1] If the Court of Appeals finds error with respect to the material facts found by the NLRB, I will consider whatever appropriate motions the parties may choose to make at that time.

> cease doing business with any other person. By its terms the statutory prohibition applies to the undisputed facts of this case. *Id.* at 222, 102 S.Ct. at 1662.

The Court spelled out the elements of a § 8(b)(4) violation as follows: "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person." *Id.* at 222 n. 18, 102 S.Ct. at 1662 n. 18 quoting *Carpenters* v. *NLRB,* 357 U.S. 93, 98, 78 S.Ct. 1011, 1015, 2 L.Ed.2d 1186 (1958). The third requirement is satisfied where the foreseeable consequences of a purely secondary boycott can reasonably be expected to threaten neutral parties with ruin or substantial loss. *Id.* 456 U.S. at 223, 102 S.Ct. at 1663. Defendants' assertion that their intent was not, in fact, to cause a cessation of business is irrelevant. *See id.* at 222, 102 S.Ct. at 1662. Based on the facts found by the NLRB and the admissions made before this court, the three part test under § 8(b)(4) has been satisfied: Employees were induced—indeed they were ordered—to engage in a concerted refusal to handle Soviet cargo. And a foreseeable result of their action was to threaten neutral parties, including Allied, with substantial loss, since it was clearly foreseeable that nonunion labor would not be available to unload the cargo. *See* 257 NLRB No. 151 at 30, 32-3, 35-6.

Defendants contend that even if a violation of § 8(b)(4)(B) can be found, the motion for summary judgment must be denied because plaintiff must also show that the secondary boycott specifically caused it to suffer damage before it can recover under § 303. This contention is without merit because the summary judgment is limited to the issue of liability. Defendants will still have full opportunity to

contest what, if any, damage was actually suffered by Allied as a result of defendants' illegal boycott. Courts routinely grant partial summary judgments on the issue of liability in § 303 actions upon the NLRB's determination of § 8(b)(4)(B) violations. *Texaco, Inc.* v. *Operative Plasterers and Cement Masons International Union, supra; Paramount Transport Systems* v. *Chauffeurs Teamsters & Helpers Local 150, supra; Jaden Electrical Co.* v. *International Brotherhood of Electrical Workers, supra. See also H.L. Robertson & Associates* v. *Plumbers Local Union No. 519, supra.* To relitigate all of the underlying facts because the single issue of damages remains unresolved would contravene the considerations of judicial efficiency which are central to the doctrine of collateral estoppel.

Defendants' final contention is that they should be entitled to litigate their defense that Allied's imports are the product of slave or forced labor within the meaning of § 307 of the Tariff Act of 1930, 19 U.S.C. § 1307. This assertion is wholly unsupported by documentation or affidavit. "[A] party cannot rest on the allegations in his (pleading) in opposition to a properly supported summary judgment motion made against him." *First National Bank of Arizona* v. *Cities Service Co., Inc.,* 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). Fed.R.Civ.P. 56(e). *See also Hahn* v. *Sargent,* 523 F.2d 461, 464 (1st Cir.1975) *cert. den.* 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 54 (1976). Indeed, in all of the proceedings in this case to date, defendants have contended and the President of the ILA has specifically asserted that the boycott was performed solely to redress the Soviet invasion of Afghanistan. *See, e.g.,* Directive of President Gleason, January 9, 1980, Complaint at 5-6; Affidavit of John Bowers, May 23, 1980, at 4.

Accordingly, plaintiff's motion for a partial summary judgment with respect to liability against defendants is ALLOWED. The motion for a protective order is DENIED as moot. Discovery will be limited to the issue of damages and is to be completed by January 31, 1983.

This case is set down for pre-trial conference on the issue of damages on February 15, 1983. The Clerk will forward to counsel a copy of the standard pre-trial order together with copies of this order.

APPENDIX C

Transcript of Hearing

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action
No. 80-584-S

SKINNER, D. J.

ALLIED PLYWOOD CORP.

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

Hearing

APPEARANCES:

Nutter, McClennen & Fish (by Danielle deBenedictis, Esquire) 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiff.

Thomas W. Gleason, Esquire, 26 Broadway, New York, NY 10004, on behalf of the Defendant.

Courtroom No. 6
Federal Building
Boston, MA 02109
June 12, 1985

Marie L. Cloonan
Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109

The Court: First, I have a motion to amend the complaint.

Mr. Gleason: That was just served on us today, your Honor.

The Court: You are not going to oppose it, are you?

Mr. Gleason: Yes, I am.

The Court: Why?

Mr. Gleason: I want to read it first.

The Court: All it does is change the name of the plaintiff from Allied International, Inc., to Allied Plywood.

Mr. Gleason: It changes the party, not just the name. It changes the party that was in existence when we called the boycott to their successor in interest. It is a very different situation.

Your Honor, let me have a chance to respond to the motion.

The Court: Bananas. Give me a pen. Allowed.

Mr. Gleason: They sold their assets to this other company in 1981.

The Court: If they want to substitute this outfit as a plaintiff and you find they don't have any recoverable interest, then you win, so what are you complaining about?

Mr. Gleason: I would like discovery of this new plaintiff.

Ms. deBenedictis: The only thing is Allied International it is now an unincorporated division. You may remember there were many different Allied Corporations.

The Court: I do remember.

Ms. deBenedictis: They are under one corporation, Allied Corp.

The Court: This is allowed.

If you find there isn't the continuity of interest, then you make your motion for a directed verdict and you walk

out smiling. At least if they want to do that, they can do it.

All right, Motion for Order to Compel Discovery. That is the defendant's motion, 497. Is that the first motion in order?

Mr. Gleason: I think so, your Honor.

The Court: You just filed this yesterday?

Mr. Gleason: Then that is not the one that is on. We have several motions.

Ms. deBenedictis: I think maybe chronologically—

The Court: Has this case been pre-tried?

Ms. deBenedictis: No, your Honor. I think chronologically I had—

(Discussion off record between the Court and the clerk.)

Ms. deBenedictis: Chronologically, I think the first motion that was filed was my motion to compel them to supplement their expert's answer.

Mr. Gleason: The first motion is my motion to compel you to file Interrogatory 59, which was filed a year and a half ago.

The Court: I don't know why—Why was this not sent down to a Magistrate?

(Discussion off the record between the Court and the clerk.)

The Court: Why weren't these motions sent down? I have a whole batch of them. May 24, June 4, June 11, February—Magistrate Cohen, has been handling the—

Ms. deBenedictis: That was one motion a long time ago, your Honor.

The Court: The rule is that once the Magistrate takes it, he gets all the discovery stuff. I'm not going to get

into all this discovery matter. I thought we had something of substance here. The case is off the list for June 24. There is now going to be a discovery cut off. Discovery will be completed within 30 days after the Magistrate rules on these various motions. It is referred to the Magistrate.

Pre-trial—

The Clerk: September 10? September 11?

The Court: Put it down for the end of July.

Ms. deBenedictis: I would much prefer to move it, your Honor.

The Court: You bet.

Pre-trial—

The Clerk: July 29, two o'clock.

The Court: —July 29 at two o'clock.

Furnish them with pre-trial orders. And I advise you both to play no games. It sounds like what is happening. Get with it. I'm going to try the case.

I'm going to set it down for trial on July 29, ready or not.

Ms. deBenedictis: Good.

The Court: If you need more discovery, you are going to be out of luck.

Ms. deBenedictis: That is fine.

Mr. Gleason: I thought it was pre-trial?

The Court: Right, I will assign a trial date at that time, and it will be a firm trial date.

Mr. Gleason: Fine.

The Court: I'm afraid I'm going to ask you to go along until Magistrate Cohen can deal with these matters.

(Whereupon the hearing was concluded.)

CERTIFICATE

I, Marie L. Cloonan, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 5, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Civil Action No. 80-584-S Allied Plywood Corp. Vs. International Longshoremen's Association.

/s/ Marie L. Cloonan

APPENDIX D

Motion for Reconsideration

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 80-584-S

ALLIED PLYWOOD CORP.,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.

DENIED! 7-24-85 W. Skinner, USDJ

Defendant International Longshoremen's Association, AFL-CIO, by and through its undersigned attorneys, moves this honorable court for an order pursuant to Rule 7 of the Federal Rules of Civil Procedure (i) granting reconsideration of the order entered June 12, 1985, which granted plaintiff's motion for leave to serve an amended complaint; (ii) upon reconsideration denying plaintiff's motion or clarifying the role of Allied Plywood Corporation to be solely as assignee of the original plaintiff; (iii) in the alternative, if the court adheres to its prior decision, vacating the order entered October 1, 1982, which granted summary judgment in favor of plaintiff and extending discovery to July 1982; and (iv) granting defendants such other and further relief as the court deems just and proper.

The grounds for this motion are, as more fully set forth in the annexed affidavit of Ernest L. Mathews, Jr., sworn

to the 3rd day of July, 1985, and the accompanying memorandum of law, that the amendment of the complaint is untimely, expands the issues and delays the outcome of the case and is prejudicial to defendants, and that the substitution of a new plaintiff entitles defendants to assert affirmative defenses not available against the original plaintiff and requires additional discovery to prepare for trial.

Dated: July 3, 1985

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APPENDIX E

Assessment of Damages—Findings and Order for Judgment of United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 80-584-S

ALLIED PLYWOOD CORPORATION,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.

ASSESSMENT OF DAMAGES—
FINDINGS AND ORDER FOR JUDGMENT

September 19, 1986

SKINNER, D.J.

This action is before me for assessment of damages, liability having been established under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, by partial summary judgment. *Allied International* v. *International Longshoremen's Ass'n*, 554 F.Supp. 32 (D.Mass. 1982). The prior history of the case appears under the same title at 492 F.Supp. 334 (D.Mass. 1980) and 640 F.2d 1368 (1st Cir. 1981) and *sub nom International Longshoreman Association* v. *Allied International, Inc.*, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed. 2d. 21 (1982). This is one of several cases which arose throughout the country as the result of

the decision of the president of the International Longshoremen's Association ("ILA") to boycott incoming shipments of Russian goods from January 9, 1980 to June 2, 1981. The plaintiff and its predecessor corporation were importers of plywood and hardboard from Russia and claim damages for the refusal of members of ILA locals to unload their material during the boycott. They seek damages for out-of-pocket expenses, lost favorable trade arrangements with the Russians and lost profits during the period of the boycott and thereafter.

The ILA asserts that the damages are inflated, that the plaintiff and its predecessor failed to mitigate damages by taking advantage of failure of the ILA to maintain the boycott consistently in some ports, and that the plaintiff is not entitled to damages for lost future profits for the period after the original plaintiff sold its assets to the present plaintiff.

I. *Corporate Mutations of the Plaintiffs.*

The initial plaintiff here was Allied International, Inc., which was the corporation actually engaged in importing plywood and hardboard from Russia at the time of the boycott. The stock of this corporation was owned by Morton F. Waldfogel and Edward J. Gildea. Waldfogel and Gildea also jointly owned other corporations which were engaged in the distribution of wood products, which included some of the material imported by Allied International, Inc. These corporations were sometimes referred to in the testimony as "the warehouses" and I shall so refer to them hereinafter. The warehouses were not joined as plaintiffs in this action.

Assessment of Damages—Findings and Order for Judgment of United States District Court

On April 29, 1981, all of the assets of Allied International, Inc. were sold to APC Plywood Corporation, a new corporation formed for the purpose of acquiring a number of the corporations owned by Waldfogel and Gildea, including Allied International, Inc. and the warehouses. After APC Plywood Corporation acquired these assets, it changed its name to Allied Plywood Corporation. On June 12, 1985, Allied Plywood Corporation was substituted as the plaintiff in this case, over the objection of the defendant.

After April 29, 1981, the business of Allied International, Inc. and the warehouses continued as before, but as divisions of Allied Plywood Corporation instead of separate corporations. Eighty percent of the stock of Allied Plywood Corporation is owned by Ziedler's, Inc., a corporation in which neither Waldfogel nor Gildea has an interest; most of the remaining twenty percent is owned by Waldfogel and Gildea.

After the hearing on the assessment of damages, on March 31, 1986, APC Liquidating Trust was further substituted as the plaintiff, but no separate damages are sought for APC Liquidating Trust. This substitution does not affect the disposition of the case, and I will ignore it hereafter in these findings.

There is no doubt that by the very general terms of the agreement providing for the sale of assets Allied Plywood Corporation acquired the claims of Allied International, Inc. *National Council of Young Israel, Inc.* v. *Feit Co., Inc.*, 347 F.Supp. 1293, 1295 n.3 (S.D.N.Y. 1972). By the 1985 amendment Allied Plywood Corporation also claimed its own lost profits attributable to the boycott. Since Allied Plywood Corporation acquired the warehouses as well

as Allied International, it now claims the lost profits of the warehouses. Resolution of these issues depends upon the proper application of Fed.R.Civ.P. 15(c), which concerns the relation back of amendments. If this claim does not relate back, it is barred by the statute of limitations, which is the three-year statute applicable to torts. M.G.L. c. 260, § 2A. *Park Electric Co.* v. *Intern. Broth. Elec. Workers,* 593 F.Supp. 1060 (N.D. Ill. E.D. 1984).

In my opinion, the original complaint clearly set forth a claim for lost profits without limit of time. If the defendant was led to believe to its prejudice that only the lost profits up to the point of sale were claimed, such prejudice was obviated by the time that elapsed between the amendment and the actual beginning of the trial. In fact, the defendant presented a fully articulated defense with respect to the entire period claimed. Accordingly, I find that the amended complaint properly stated a claim for the lost profits of the International Division of Allied Plywood Corporation as well as for the lost profits of Allied International, Inc.

I arrive at a different result with respect to the asserted claims for lost profits of the warehouses. During the time of the boycott, they were organized as separate corporations and treated as customers of Allied International, Inc. Their claims were not included or alluded to in the original complaint. By the time of the amendment, they would have been barred by the statute of limitations. In my opinion, insofar as the amendment would incorporate a claim for the lost profits of the warehouses, it does not relate back to the time of the original filing and is barred.

The claim for lost future profits shall accordingly be limited to the lost profits of Allied International, Inc. and

the International Division of Allied Plywood Corporation. In the following discussion, I shall use the term "Allied" to refer to both these entities and the term "ILA" to refer to the defendant.

II. *Allied's Alleged Failure to Mitigate Damages.*

The ILA claims that beginning in February, 1980, various of its locals in southern ports began to disobey the boycott order of the ILA's president, Thomas Gleason. It claims that if Allied executives had been diligent, Allied could have taken advantage of the "porosity" of the boycott and reduced their losses by unloading hardboard at the southern ports, which it did before the boycott anyhow, to serve customers who were close to those ports.

Allied seeks to give preclusive effect to certain findings of the NLRB in a related case, *International Longshoremen's Association, AFL-CIO and Local 799, International Longshoremen's Union, AFL-CIO* v. *Allied International, Inc.*, 257 NLRB No. 151 (1981). Determinations which resolve "disputed issues of fact properly before [the agency] which the parties have had an adequate opportunity to litigate" are entitled to preclusive effect. *United States* v. *Utah Construction Co.*, 384 U.S. 394, 422 (1966). The NLRB made the following findings which I rule were necessary to its determination that the ILA violated § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) and accordingly binding on the parties in this proceeding:

1. Due to the ILA boycott, Allied and Waterman in late January, 1980, diverted the Waterman Steamship MIDDLETON to Montreal to unload its cargo. 257 NLRB at 1076.

Assessment of Damages—Findings and Order for Judgment of United States District Court

2. Due to the ILA boycott, Allied and Waterman directed the Waterman Steamship JEFFERSON to leave Leningrad without any freight in late January 1980. *Id.*

3. On March 12, 1980, after the United States District Court for the Southern District of Georgia had issued an injunction against the ILA boycott in the ports of Savannah and Brunswick, Georgia, Edward Gildea of International inquired of the ILA whether its position had changed. In reply to Gildea's inquiry, Edward Connolly of ILA Local 799, stated that any change in the ILA's position would be transmitted to him from ILA vice president William Hankard who would check with President Gleason. *Id.*

4. On March 25, 1980, Jack Caires, vice president of International met with William Hankard of the ILA. Hankard informed Caires that the ILA's position with respect to the handling of Russian cargo had not changed but that he would discuss handling the Russian cargo in the port of Boston with Thomas W. Gleason and stated that "the local stevedores do what they are told to do". *Id.*

5. A trained, completely nonunion gang was not available to unload vessels carrying International's Baltic product in Boston during the pendency of the boycott. Scalawags refuse to work ships when the ILA engages in a work stoppage of any kind. *Id.; see id.* at 1084.

6. After ILA President Gleason's announcement of the boycott, Allied contacted ILA representatives several times to determine if the ILA would unload Allied's wood in the

port of Boston. Each time the Union informed Allied that its position was unchanged and the boycott was firm. *Id.*

Allied relied in part on the representation of its carrier, Waterman Steamship Company, that all the east coast and Gulf ports were closed. In addition, Allied officers made inquiry of ILA representatives and port authority officials in all the critical ports and were informed that the boycott was in effect in all the ports which Allied had formerly used. Prior to the boycott, Allied had imported plywood into Boston (and small amounts into Los Angeles) and hardboard into Boston, Houston, New Orleans, Wilmington, Moorehead City, Jacksonville and occasionally Los Angeles and Vancouver.

ILA witnesses have testified, however, that beginning in the spring of 1980, Russian cargoes were handled by its locals in New Orleans, Houston, Hampton Roads, Chicago, Savannah, Charleston and Wilmington. There was no evidence that this was generally known, however, and in fact the amounts of imported Russian cargo were relatively small, the only large item being export of grain to the U.S.S.R. through New Orleans. In view of the ILA's public and private statements, there was no obligation on the part of Allied to make a continuous check of cargoes in all of these ports.

The defendant points out, and Allied admits, that Allied knew of several injunctions that had been issued against the boycott. Some of these injunctions only referred to a particular ship. Several district courts refused to grant injunctions,[1] and several courts of appeal reversed the injunctions issued by the district courts. I rule that Allied

[1] Indeed, I refused to grant an injunction in this case with respect to the port of Boston.

was not obliged to "buy a lawsuit" in an effort to mitigate damages.

Preparing a shipload of plywood and hardboard from Leningrad required months of lead time and advance commitments to the Russians and to the steamship company. In my opinion, Allied was not obliged to undertake such commitments in the absence of assurance that the ships would be unloaded, or on the basis of sporadic and unpredictable "porosity" of the boycott. Accordingly, I rule that there was no failure on Allied's part to mitigate damages, and it is entitled to all the damages it can prove.

III. *Lost Profits.*

By far the most substantial element of damages asserted by the plaintiff are the lost profits it suffered by reason of the unavailability of the Russian products caused by the defendants' boycott. Two elements of claimed loss of profits can be disposed of summarily. These are the profits said to have been lost because the THOMAS JEFFERSON left Leningrad without plaintiff's cargo in March, 1980 and the MIDDLETON left Leningrad with only one-third of the scheduled cargo. No pretrial notice of these claims was given to the defendants, and they were disallowed at trial.

The standards governing recovery of lost profits in a federal case follow the general rules of the common law, which have been most elegantly stated by the late Chief Justice Rugg of Massachusetts in a series of opinions:

> Prospective profits may be recovered in an appropriate action when the loss of them appears to have been the direct result of the wrong complained of and when they are capable of proof to a reasonable degree of

> certainty. They need not be susceptible of calculation with mathematical exactness, provided there is a sufficient foundation for a rational conclusion. [Citations]. But such damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty.

Lowrie v. *Castle,* 225 Mass. 37, 51 (1916); *Randall* v. *Peerless Motor Car Co.,* 212 Mass. 352, 380 (1912).

In *Hetherington & Sons* v. *William Firth Co.,* 210 Mass. 8 ( ), Chief Justice Rugg restated the general principle and capped his comments for posterity on page 21 with the following sobering thought: "The difficulty is not so much in the statement of the general principle as in applying it." Indeed.

In this case, the task is somewhat eased by the fact that Allied is an established company with a track record of profitability. At the time of the boycott, I find that it was aggressively and efficiently managed, had increased sales and profits in each of the previous three years of operation and had a good reputation in the industry for reliability. Russian hardboard was sold at a very competitive price because of the low cost, but was substantially the same as hardboard from other sources except that Allied could offer "king-size" sheets because of the larger size of Russian presses. The five-ply Baltic birch plywood was a unique product because of the clear face (free of knots and splices).

I further find that Allied had not saturated its markets and if market conditions had remained stable and there had been no boycott, Allied would probably have continued to enjoy an annual increase in sales and profits tapering off

in the mid 1980's when it presumably would have saturated its market.

Allied's expert witness, Dr. Kendall, projected a delay in reaching the saturation point because of the boycott and the resulting time lag in the recapture by Allied of its lost markets. He projected resulting losses through 1989. I find that saturation of its markets by Allied was probably delayed as a result of the boycott but I also find that Dr. Kendall's quantification of consequential damages was based on unproved assumptions of a continuing demand and continued high performance on the part of Allied. Among other changes that may well have affected profits was the partial withdrawal of Waldfogel and Gildea from active management and their conversions from entrepreneurs to investors. Accordingly, I have not included damages for delay in saturation of the market in my computation.

In addition, Allied asserts that because of the boycott, it lost a favorable arrangement by which it paid for the Russian product f.o.b. the factory rather than f.o.b. the pierhead in Leningrad. Allied was able to arrange more economical transportation than the transportation charge imposed by Exportles, the Russian supplier. Furthermore, United States customs was based on the lower f.o.b price, thus effecting additional very substantial savings since the import duty on this product is 50%. This additional loss should be subsumed in the lost profits figures referred to hereinafter for the year considered, but Allied contends that this is a loss that has been suffered each year since the boycott and will continue. Allied's assertion of damages assumed that its favorable arrangement with the Russians would have continued indefinitely. I am willing to

accept the proposition for a period of years, but not indefinitely.

As time passes from the end of the boycott, the existence of causally related damages becomes less clear in a changing and highly competitive environment. As a rough analogy, the ripples from a stone thrown in a still pond may be followed to the water's edge, but on a windy day they become lost in the natural turbulence of the surface. Keeping in mind the strictures of Chief Justice Rugg, I have determined that damages are ascertainable "to a reasonable degree of certainty" through January 31, 1984.

Complicating the projection of lost profits based on the plaintiff's history is the fact that beginning in 1980, the building industry, one of the principle end users of hardboard, entered a period of depression that lasted in varying degree for the next three years. Mr. Muench and Mr. Sklar, defendant's experts, while persuasive on this point, were not familiar with Allied's business. Dr. Kendall, the plaintiff's witness, attempted to establish that Allied's business was more closely related to the Gross National Product ("GNP") than to its particular markets. Mr. Kendall arrived at this conclusion by utilizing what he said were standard economic formulae. I have to take his word for that; he was not substantially impeached on the point. I am persuaded of the validity of his result, however, because he successfully demonstrated that the sales of Allied's non-Russian wood products continued to rise, though less steeply than previously, more or less in the line with the GNP, even though the markets for wood products generally were in a precipitous nosedive. This reflects the aggressive marketing and efficient distribution of Allied. The unique character of the 5-ply Baltic birch further sup-

ports the position that Allied is likely to have continued to show some growth even during the general depression in the industry. Much of the Russian products went into furniture, which was not in such serious decline as housing.

Accordingly, I accept Dr. Kendall's opinion as to lost profits, making an adjustment for the fact that he has lumped the losses from the warehouses in with the losses sustained by Allied. Dr. Kendall calculated the lost profits in current dollars, restated them in constant 1967 dollars and carried the constant dollar figure forward to 1980, using a 9.8% growth and discount rate. His estimated gross lost profit as of January 31, 1984 was $11,419,797. At trial, Dr. Kendall carried forward some of his 1980 figures to value as of the time of trial, October, 1985. Extrapolating from Dr. Kendall's figures, the 1985 value of gross lost profit through January 31, 1984 is $18,225,000. Net profit was generally 52% of gross profit. The value as of the time of trial of net lost profits through January 31, 1984 was $9,477,077.

Looking at the various figures for Allied and the warehouses compiled by Kendall and Gillis, I conclude that on the average about 15% of overall profit was attributable to the warehouses. I have previously held those profits not to be recoverable in that action and accordingly subtract 15%, leaving a net lost profit through January 31, 1984 attributable to Allied of $8,055,490.

Dr. Kendall's method of calculation includes all adjustments for inflation and the cost of money through October, 1985. No prejudgment interest is therefore appropriate except for the period from November 1, 1985 to the date of judgment.

Assessment of Damages—Findings and Order for Judgment of United States District Court

IV. *Direct Out-of-Pocket Losses.*

Besides the alleged loss of anticipated profits, Allied claims out-of-pocket expenses with respect to shipments to Boston and Montreal which would have gone elsewhere. These expenses have been presented as if they were items of damage in addition to lost profits. They occurred during the period included in the lost profit calculation, however, and were reflected in the actual profit, which was used as basis for calculating the loss. They have, therefore, been subsumed in the damages awarded for lost profits. Possibly the plaintiff intended to offer them as an alternative basis for damage in the event that I did not accept the evidence of lost profits. In order to complete the record, I will make the following findings concerning these claims, but do not find them as elements of damage in addition to lost profits.

These claimed damages arise out of increased expenses resulting from the disposition of actual shipments of Russian plywood and hardboard which could not be unloaded at the intended ports because of the ILA boycott. These damage claims arise in two general categories: (1) a cargo destined for southern ports but unloaded in Boston and (2) ten cargoes diverted to Montreal.

(1) The cargo destined for southern ports arrived in Boston along with some cargo for Boston on January 9, 1980, a few days after the declaration of the boycott, aboard the GEORGE WALTON. The ports which the WALTON was subsequently scheduled to visit were closed. Gleason, the president of the ILA, told Waldfogel that he would permit the unloading of the WALTON at Boston but nowhere else. The cargo destined for southern ports con-

sisted of approximately 6,000 tons of hardboard. This material had already been sold to customers but could not be delivered, because the cost of overland delivery was prohibitive. This material was stored in Boston and sold to others over a two-year period.

The plaintiff claims $229,411 for the difference between the contracted price for the hardboard and its eventual sale price. When pressed, however, plaintiff's witnesses could not identify either the contract price or the actual sales price, and I cannot determine if this figure is anything more than a guess. It also claims an item listed as L/C Expenses—$7,325.16 for which there was no explanation. I disallow both of these claims. I find that the following damage items have been established by a preponderance of the evidence.

Storage	$ 22,691.83
Loading	21,836.82
Handling	20,887.39
Trucking	15,109.42
Bonding	6,378.00
Loss resulting from delay in realizing sale price	137,380.47
Subtotal	$224,283.93

(2) The expenses as claimed for the ten cargoes diverted to Montreal must be adjusted to reflect the fact that there would have been other expenses associated with their delivery in Boston. For instance, the plaintiff is only entitled to recover the excess of customs fees over the fees which would have been paid on these cargoes in Boston. The cost

of trucking the product from Montreal to Boston must be offset by the cost of drayage between the Castle Island Terminal and Allied's warehouse. ILA proposed offsetting figure of $191 per truckload is incorrect however, and I accept Waldfogel's testimony that the correct figure is $53.25 per truckload. Some of the product was shipped directly from Montreal to the customer, and Allied claims this expense as damages. It is necessary, however, to discount this amount by the cost of shipping the same product directly from Boston ("Alternative Boston Cost"). I accept the calculations of Sclar, the ILA expert, as being reasonable estimates of "Alternative Boston Cost" and will apply this as a credit.

Many shipments of the product were made to Boston and thence shipped out of Boston. The defendant claims a credit for any saving which would have been made by sending the product directly to the customer from Montreal. The plaintiff claims, and I find, that it was necessary to ship most of the plywood to Boston for sorting and grading, as it was not shipped by the Russians according to specification. Allied had attempted to do the sorting and grading on the dock but had found it impossible. It may be there was some inefficiency in transshipment of some of the hardboard, but I am not satisfied that Sclar had correctly calculated the credit. I find the preponderance of the evidence supports the plaintiff's claim.

The nine cargoes are from the following ships:

ARTHUR MIDDLETON, January 28, 1980
KAPITAN REUTOF, May 27, 1980
SEGHEZA, July 26, 1980
ZAPOLIARNY, July 30, 1980
JEFF DAVIS, January 17, 1981

Assessment of Damages—Findings and Order for Judgment of United States District Court

STANISLAVSKY, January 17, 1981
PIONEER BELORUSSI, February 2, 1981
INDIGIRKA, March 19, 1981
PROFESSOR RYBALTOVSKY, May 2, 1981
JEFF DAVIS, June 7, 1981

I have not awarded damages on account of a cargo unloaded from the THOMAS NELSON in Montreal on July 21, 1981. The NELSON passed very close to Boston on its route to Montreal, and there was ample time after the announced end of the boycott on June 4, 1981 to divert the ship to Boston.

The aggregated net damages by category, taking into account the credit referred to are as follows:

Transportation, Boston to Montreal	$225,285.05
Increment for direct shipment, Montreal to customers	13,515.65
Tailgating charges	22,171.56
Shed rental, additional customer charges, brokerage and wharfage	31,532.64
Subtotal	$292,504.90

In addition, there is a single item for storage of unshippable wood products in Leningrad, for which I find the realized loss to be $109,291, although plaintiff claims over half a million dollars for this item.

I have disallowed the following claims as being unexplained or inadequately supported:

Insurance	$2,007.86
Allied International Trucking	1,577.47

Assessment of Damages—Findings and Order for Judgment of United States District Court

Claims for a settlement with Waterman and for attorneys' fees were excluded at trial. I find that the total direct loss to the plaintiff established by a preponderance of the evidence, after allowing for all appropriate credits, is $626,079.83.

V. *Order for Judgment.*

Judgment shall enter for the plaintiff in the amount of $8,055,490 with prejudgment interest at the rate of 8% only from November 1, 1985 to the date of judgment, plus costs.

/s/ WALTER JAY SKINNER
United States District Judge

APPENDIX F

Order on Plaintiff's Motion for Amended Findings and Judgment of United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 80-584-S

APC LIQUIDATING TRUST,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR AMENDED FINDINGS AND JUDGMENT

October 8, 1986

SKINNER, D.J.

Plaintiff points out that the incremental adjustment for time which I used in making my finding of damages omitted the period from January 31, 1985 to the time of trial. My calculations were based on extrapolation of a figure given by Dr. Kendall for extension of a different damage figure to the day on which he was testifying. Reconstructing this calculation, it appears that he omitted the January-October period, and consequently I did also. I am inclined to let

the matter lie, particularly since the growth rate of 9.8% may be somewhat high for 1985.

The simpler course, which I now adopt, is to amend the order for judgment to provide for pre-judgment interest to run at 8% from February 1, 1985 rather than from November 1, 1985.

So ordered.

/s/ WALTER JAY SKINNER
United States District Judge

APPENDIX G

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1947

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant-Appellant.

No. 86-1987

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.,

Defendants-Appellees.

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant-Appellant.

JUDGMENT

Entered: March 23, 1987

Judgment of United States Court of Appeals

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano
Clerk.

Costs in favor of the appellee
are taxed at $1,667.00.

Certified and issued
as informal mandate under
F.R.A.P. 41 on APR 16 1987

Francis P. Scigliano

By /s/ Richard W. Gordon
Chief Deputy Clerk.

[cc: Messrs. Mathews and Doyle and Ms. DeBenedictis]

APPENDIX H

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1947

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendant-Appellant.

No. 86-1987

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO, ET AL.,

Defendants-Appellees.

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSN., AFL-CIO,

Defendant-Appellant.

Before

CAMPBELL, *Chief Judge.*
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges.

Order of United States Court of Appeals

ORDER OF COURT

Entered: April 22, 1987

The "Petition for rehearing in banc" by appellants having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court in banc,

It is ordered that the suggestion for rehearing in banc be denied.

By the Court,

Francis P. Scigliano
Clerk.

[cc: Messrs. Mathews, Doyle and DeBenedictis]

Supreme Court, U.S.
FILED
JUN 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1858

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, AND LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DANIELLE E. DEBENEDICTIS *
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I

List of Parent, Subsidiary and Affiliated Corporations, Pursuant to Rule 28.1

Allied International, named as respondent herein, sold all its assets to Allied Plywood Corporation on April 29, 1981. Allied Plywood Corporation transferred its assets to APC Liquidating Trust during 1986.

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In the
Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1858

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, AND LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Court of Appeals for the First Circuit in this case.

Statutes Involved

1. Rule 15(a) of the Federal Rules of Civil Procedure provides:

> AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

2. Rule 15(c) of the Rules of Civil Procedure provides in relevant part:

> RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Statement of the Case

The petitioner makes an incomplete statement of the action and therefore, respondent makes its own statement of the case.

In January, 1980, the International Longshoremen's Association ("ILA") began its boycott of all incoming or outgoing Soviet cargo. The ILA's boycott caused continuing harm to the Russian wood importing business of Allied International, Inc. ("Allied International"). Allied International filed this action in March, 1980 for the ongoing damages. Allied International claimed it had been "damaged in the amount of $5 million dollars to date and face[d] prospective damages of upwards of $10 million dollars." *See,* ILA Petition ("Pet.") at 10a.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. 492 F.Supp. 334 (D. Mass. 1980). The Court of Appeals for the First Circuit reversed. 640 F.2d 1368 (1st Cir.-1981). After granting certiorari, this Court unanimously held that the conduct of the ILA was an illegal secondary boycott. 456 U.S. 212 (1982). On remand, the district court entered partial summary judgment against the ILA on the issue of liability. 554 F.Supp. 32 (D. Mass. 1982).

Unrelated to the ILA's illegal boycott, Allied International, along with a group of related corporations, sold all of its assets to Allied Plywood Corporation ("Allied Plywood") on April 29, 1981. As part of this transaction, Allied International expressly assigned its claim in this action against the ILA to Allied Plywood. No change occurred in the business or management of Allied Plywood. The operation continued as before, uninterrupted.

On June 12, 1985, Allied International moved to amend the complaint in order to substitute Allied Plywood for Allied International as plaintiff. The district court allowed plaintiff's motion, and the ILA never answered or otherwise responded to the amended complaint.

After an October, 1985 trial on damages, the district court entered judgment in September, 1986 for $8,055,490 plus pre-judgment interest. On March 23, 1987, the Court of Appeals for the First Circuit affirmed the district court's opinion in full. The First Circuit denied the ILA's request for rehearing in banc on April 22, 1987.

Reasons the Petition Should Be Denied

I. This Case Represents a Straightforward Application of Rule 15 of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 15 fully resolves the issues raised by the ILA in its petition. The ILA's petition presents no important question of federal law, shows no departure from the accepted and normal course of judicial proceedings, and does not establish any division among federal circuits on any issue.

The ILA argues that it was deprived of due process and its right to a jury trial when the district court granted recovery on the claim by Allied Plywood that was purportedly never asserted and expressly renounced. Pet. at 10-11. The ILA's contention misstates the record, ignores the pleadings in this action, and disregards the Federal Rules of Civil Procedure. Both the original and amended complaints notified the ILA as to all claims asserted against it. Further, the ILA received a full hearing on the question of whether Allied Plywood was entitled to assert a claim for damages.

The district and circuit courts considered at length whether the amendment naming Allied Plywood should "relate back" under Rule 15(c) to the time of filing of the original complaint. Whether relation back should be allowed is based on considerations of "fairness" to the defendant. In holding that the amended complaint properly related back to the time of filing of the original complaint, both courts determined that the claims asserted against the ILA in the original and amended

complaints were essentially identical, that extensive discovery both well before and after the amendment notified the ILA of the damages claimed, that at trial the ILA asserted full defenses to all damages claimed, and that the ILA knew of all claims asserted against it.

Accordingly, the ILA fails to raise any issue of due process since it had every opportunity to contest, and defend against, all claims made. Given the extensive consideration by the courts below, the petition of ILA does not raise any issue of due process.

A. *Federal Rule of Civil Procedure 15 Was Properly Applied in This Case.*

On June 12, 1985, the district court allowed Allied International's motion to amend the complaint naming Allied Plywood as plaintiff. Allied International sold all of its assets and assigned its claim for damages against the ILA to Allied Plywood. The ILA objected to the district court's order, claiming the amendment somehow "changed the party, not just the name" of the plaintiff and that "this was a very different situation." *See* Pet. at 30a.

Rule 15(a) makes the well-known admonition that leave to amend "is to be freely granted when justice so requires." Fed. R. Civ. P. 15(a). This court has noted that the mandate of Rule 15(a) is to be heeded and that, absent such circumstances as undue delay, bad faith or undue prejudice, amendment is to be allowed. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *see also, Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148 (1964); *U.S.* v. *Hougham*, 364 U.S. 310 (1960). Absent fundamental unfairness to the opposing party, the grant or denial of leave to amend is entirely within the discretion of the trial court. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). The circuit court here found that the district court did not abuse its discretion in allowing this amendment.

Once the district court properly allowed the amendment, no further inquiry is necessary, assuming Allied Plywood merely continued to assert the claim of Allied International. If, however, Allied Plywood asserted a new and separate claim, as the ILA contends and the circuit court assumed for purposes of deciding the case, the second issue is whether Allied Plywood's amended complaint should relate back to Allied International's original claim in order to avoid the applicable three year limitation period. *See* Mass. Gen. Laws ch. 260, § 2A. A new claim, if it is to relate back, must arise from the same conduct, transaction or occurrence set forth in the original complaint. Fed. R. Civ. P. 15(c). The Rule also states that where a new defendant is added the amendment will relate back if the new defendant received notice of the action prior to the running of the statute of limitations and is not prejudiced in maintaining its defense. Although Rule 15(c) does not expressly treat the problems of substituting plaintiffs since it is "generally easier," the same approach mandated for naming new defendants is to be applied to plaintiffs. Fed. R. Civ. P. 15(c), Notes of Advisory Committee on Rules, 1966 Amendment.

An amendment substituting a new plaintiff should be allowed to relate back where the new claim arises out of the same conduct as the original complaint and where consequently there is no prejudice to the defendant in defending that claim. *See, e.g., Verdi* v. *City of Philadelphia*, 553 F.Supp. 334, 339 (E.D. Pa. 1982); *De Franco* v. *United States*, 18 F.R.D. 156 (S.D. Cal. 1955). In particular, where the plaintiffs in the original and amended complaint are found to have an "identity of interest" so that the same conduct of the defendant is at issue in both the amended and original complaint, the amendment is allowed to relate back as a matter of course. *See Staren* v. *American National Bank & Trust Co. of Chicago*, 529 F.2d 1257 (7th Cir. 1976); *Hill* v. *BASF Wyan-*

dotte Corp., 782 F.2d 1212 (4th Cir. 1986); *Raynor Bros.* v. *American Cyanamid Co.*, 695 F.2d 382 (9th Cir. 1982); *Warpar Mfg. Corp.* v. *Ashland Oil, Inc.*, 102 F.R.D. 749 (N.D. Ohio 1983); *Unilever (Raw Materials) Ltd.* v. *M/T Stolt Boel*, 77 F.R.D. 384 (S.D. N.Y. 1977). Based on this substantial and well-accepted body of law, the district court held that the amendment related back pursuant to Rule 15(c).

Having reviewed the record extensively, the circuit court found that Allied Plywood and Allied International each asserted a claim arising from the ILA's wrongful secondary boycott of Russian cargo. *Allied International, Inc.* v. *International Longshoremen's Association*, 814 F.2d 32, 37 (1st Cir. 1987). The court further concluded that the ILA had been on notice, both from the original complaint and from the extensive discovery taken, that the plaintiff was claiming all lost profits attributable to the illegal boycott. *Id.* As between Allied Plywood and Allied International there was an "identity of interest" with the only difference between their claims being a temporal one. *Id.* at 36. Hence, the ILA was not prejudiced in defending against Allied Plywood's claim.

Accordingly, the amendment naming Allied Plywood as plaintiff was allowed to relate back to the time when Allied International filed the original complaint. There is no important question of federal law and no departure from the accepted course of judicial proceedings.

B. *There Was No Prejudice to the ILA From the Actions or Statements Made During Hearings by the District Court.*

In order to remove the case from the procedural boundary of Rule 15, the ILA asserts that the district court actually misled petitioner at the hearing on the amendment by stating that Allied Plywood was named as an "assignee" of Allied International and was not asserting a claim "in its own right". Pet. at 10-11. The record refutes the ILA's argument which is also legally baseless.

The ILA incorrectly characterizes the district court's statement. Under the ILA's scenario, the district court somehow limited the amendment, but then subsequently reversed itself by expanding the effect of such amendment.[1] In fact, the district court pointed out to the ILA that the relevant issue was whether the original and amended plaintiffs were sufficiently related so as to allow Allied Plywood to assert a claim. The district court did not limit the amendment.

Far from being unfairly surprised, the ILA argued throughout the trial that the district court should confine Allied Plywood's claim to only those damages as "assignee" of Allied International. On the first day of trial, the ILA made a motion to "limit claim" and moved to preclude plaintiff from introducing any evidence of damages after April, 1981. The district court stated that counsel would be heard on the matter at the close of evidence. *See* Appendix at A-1 - A-4. The ILA made continuing objections during the trial on this point. *See* A-5 - A-7. At the close of testimony, the ILA presented its argument in toto. *See* Appendix at A-8 - A-16.

Rationalizing that the district court deceived the ILA also distorts the appropriate functions which counsel, the court, and pleadings respectively perform. The purpose of a pleading, including an amended complaint, is to notify a defendant of the claims asserted against it. *See* Fed. R. Civ. P. 8(a). The ILA argues that notwithstanding the express language of the amended complaint, it was never notified of Allied Plywood's claim, due to the district court's purported

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[1] A reading of the colloquy itself demonstrates that the ILA's contention is plainly false. The district court stated:

> If they want to substitute this outfit as a plaintiff, and you find they don't have a recoverable interest, then you win, so what are you complaining about?

And subsequently:

> If you find there isn't continuity of interest, then you make your motion for a directed verdict and you walk out smiling.

See Pet. at 30a-31a.

disclaimer. The ILA would, in effect, create a right for counsel to "negotiate" the meaning of an amendment with the judge and then to ignore the plain language of the amended complaint.

The amendment of the complaint substituted Allied Plywood as plaintiff and notified the ILA of Allied Plywood's claim. By way of answer or motion to dismiss the ILA could have contended that Allied Plywood was not a proper party to assert a claim. The ILA, however, failed to answer or otherwise respond to the amended complaint.[2] Failing to mention, let alone explain, such gross omission on its part, the ILA now claims that it was constitutionally deprived of an opportunity to raise defenses to Allied Plywood's claim.[3]

The district and circuit courts concluded that it was fair for the ILA to defend against Allied Plywood's claim. Both courts found that the original and amended complaints by their express terms state a claim for all lost profits caused by the boycott. As early as 1983, Allied informed the ILA in discovery that plaintiff was seeking lost profits until 1986. Even after the amendment in June 1985, extensive discovery was taken as to damages through 1989 and beyond. At trial, the ILA asserted defenses against all damage claims, its protestations to the con-

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[2] The ILA's failure to raise the statute of limitations by motion or as an affirmative defense to Allied Plywood's claim means that the defense was waived. Fed. R. Civ. P. 8(b). Notwithstanding this waiver, the issue was raised by motion to preclude evidence at trial and both the district court and the circuit court gave full consideration to the defense that Allied Plywood's claim was time barred. The courts then rejected the defense pursuant to Rule 15(c).

[3] In addition to arguing that it was unable to assert its defenses, the ILA contends that it was deprived of a jury trial by the amendment of the complaint. The ILA never claimed a jury trial in response to either the amended or original complaints. The failure to claim a jury trial in a timely fashion means the right is waived. Fed. R. Civ. P. 38(b). The ILA's excuse for this waiver is again that it did not know that it was facing a new claim in the amended complaint. Such a statement was rejected by the First Circuit and ought not to be countenanced by this Court.

trary. The original complaint fully notified the ILA of all claims against it. As such, there exists no prejudice.[4]

The district court considered all of the factors now raised by the ILA in deciding to allow relation back of the amendment of the complaint. The circuit court reconsidered the question, and found that there was no abuse of discretion. Both courts decided that it was procedurally "fair" for the ILA to defend against the claim of Allied Plywood, since that claim was in substance identical to the claim of Allied International and the ILA had known of the claim from the inception of the lawsuit. Both courts made this analysis under Rule 15(c), despite the failure of the ILA to raise its objection that Allied Plywood's claim was barred in a procedurally proper manner. The ILA has not been deprived of due process, and the courts below have not departed from ordinary judicial proceedings.

II. The Opinion of the First Circuit Creates No Conflicts Between the Circuit Courts.

The ILA asserts that the decision of the First Circuit conflicts with prior decisions of other circuit courts. Such conflicts do not exist.

A. *The First Circuit Did Not Grant Recovery on a "Claim Never Asserted".*

The ILA maintains that a conflict between the circuits exists because the First Circuit granted relief in this case on what the ILA calls a "claim never asserted." Pet. at 9. The notion that the First Circuit granted relief on any unasserted claims is wholly without substance. *See* Part I *infra*.

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[4] District court opinion, Pet. at 37a-39a; circuit court opinion, 814 F.2d at 34-38.

Each case cited by the ILA for the proposition that recovery may not be had on a claim "never asserted" deals with recovery where trial is held upon claims not included in the pleadings. *See*, Pet. at 13-14. These cases hold that even where a claim is unpled, under certain circumstances the complaint may be amended to "conform to the evidence" pursuant to Federal Rule of Civil Procedure 15(b).

However, no question of the application of Rule 15(b), or of unpled claims, arises here. The only claim upon which recovery was granted was unequivocally stated and pled in both the original and amended complaints. There were no unasserted or unpled claims. Consequently, there is no question of amending any complaint to conform to the evidence," or to include claims previously unpled or "unasserted".

No conflict exists between courts addressing different issues. The propriety under Rule 15(b) of allowing recovery where claims have not been pled is an entirely separate question from allowing a claim in an amended complaint to relate back to the time of filing of an original complaint. As such, the ILA's attempt to manufacture a conflict between the circuits must fail.

B. *Allied International Did Not "Voluntarily Cease Business".*

The ILA maintains that another conflict exists between this decision and prior decisions of other circuit courts, in that the First Circuit granted recovery for damages to Allied International after its "voluntary cessation of business". Pet. at 15. The ILA's portrayal that Allied International "voluntarily ceased" business is fallacious. As the district and circuit courts found, the Russian wood importing business never ceased, nor was it even altered. Rather, the business was transferred to a new owner and continued operation as before. *See* Pet. at 38a; 814 F.2d at 34-35.

Again, the ILA endeavors to fabricate a conflict between circuits. This case does not address the central issue in the line of cases arising from *Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240 (5th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). In *Pollock & Riley* and its progeny, the plaintiff actually ceased business activity, generally as a result of the defendant's wrongful conduct. These decisions held that the plaintiff could not recover for *both* the diminished sales price of his business and future lost profits.

The *Pollock & Riley, Inc.* type of cases are inapplicable here. There is no question of double recovery in this case. Only lost profits for the continuing business, but no diminished sales price, were sought as damages.

The ILA also references such cases as *Farmington Dowel Products Co.* v. *Foster Mfg. Co., Inc.*, 421 F.2d 61 (1st Cir. 1969) as conflicting with the present case. The referenced decisions invalidate as too conjectural any method of calculating lost profits where a profit record is lacking. Such a principle does not conflict with the damages as determined in this case where the award of lost profits was based on a record of continuing actual profits. 421 F.2d at 81 n.46.

Therefore, the cases cited by the ILA either are plainly distinguishable from the case at bar, or only serve to support the damage principles in the First Circuit's decision. No conflict between the circuits exists.

C. *The First Circuit Established No Rule of Law as to the "Continuity of the Business".*

The First Circuit held in this action that there was a sufficiently close "identity of interest" between Allied International and Allied Plywood, so that the amended complaint of the latter should relate back under Rule 15(c). The ILA takes issue with this holding and maintains it is in direct conflict with the holding of the Eleventh Circuit in *Bud Antle, Inc.* v. *Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985) and other like cases.

Bud Antle does not implicate Rule 15(c), the relation back of an amended complaint, or the identity of interest test. Rather, *Bud Antle* decides the nature and extent of the "de facto merger" and "mere continuation" doctrines under Georgia law. The de facto merger and mere continuation doctrines relate to the assumption by a corporation of the liabilities and torts of its predecessor under state corporate law. These doctrines do not concern Rule 15(c) and the question of when an amendment asserting a claim on behalf of a new plaintiff properly relates back to the time of filing of the original complaint. There is no conflict between *Bud Antle* and this case.

Further, each of the cases cited as being in conflict with the First Circuit's holding as to an identity of interest is a case decided under state law regarding the assumption of corporate liabilities. *See Bud Antle, Inc.* v. *Eastern Foods, Inc.*, 758 F.2d 1451 (11th Cir. 1985) (construing Georgia corporate law); *Leannais* v. *Cincinnatti, Inc.*, 565 F.2d 437 (7th Cir. 1977) (construing Wisconsin corporate law); *Kemos, Inc.* v. *Bader*, 545 F.2d 913 (5th Cir. 1977) (construing Georgia corporate law); *Acheson* v. *Falstaff Brewing Corp.*, 523 F.2d 1327 (9th Cir. 1975) (construing California corporate law).

D. *The First Circuit States No New Policy for Secondary Boycott Claims.*

In closing its petition, the ILA argues that the First Circuit adopted a new policy that somehow expands liability in claims arising under § 303 of the Labor Management Relations Act. 29 U.S.C. § 187 (1982). This case does no such thing.

The First Circuit held that the complaint of Allied Plywood should relate back to the time of filing of the original complaint pursuant to Fed. R. Civ. P. 15(c). This straightforward application of Federal Rule of Civil Procedure 15(c) does not touch upon any questions as to liability in a Section 303 claim, and therefore cannot have "far-reaching ramifications for national labor law."

Conclusion

For the reasons stated herein, the Petition for a Writ of Certiorari to the First Circuit Court of Appeals in this case should be denied.

Respectfully submitted,

DANIELLE E. DEBENEDICTIS*
MICHAEL T. CETRONE
STEPHEN J. BRAKE
JENNIFER A. PARKS
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
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Dated: June 25, 1987

* Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 80-0584-S

ALLIED PLYWOOD COMPANY

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

SKINNER, D.J.

FIRST DAY OF NONJURY TRIAL

APPEARANCES:

NUTTER, MCCLENNEN & FISH (by Attorney Danielle E. deBenedictis, Michael T. Cetrone, Esquire and Stephen Break, Esquire), 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiffs.

LAW OFFICES OF THOMAS W. GLEASON (by Charles R. Goldburg, Esquire, and Ernest L. Mathews, Jr., Esquire), 90 Broad Street, Suite 600, New York, N.Y., 10004, on behalf of the Defendants.

Courtroom No. 3
Federal Building
Boston, Massachusetts
October 15, 1985
9:30 a.m.

* * *

[7] Ms. DeBENEDICTIS: All right.

I have a second motion in limine that I also filed on Friday with respect to preclusion of evidence as to the April 4, 1981, purchase of Allied by Seidler.

My brother's trial brief, which he filed on Friday, refers in large part to this acquisition by Seidler of Allied. You have already twice before decided this issue when you allowed my motion to amend the complaint—

THE COURT: I allowed your motion to amend the complaint on the representations that you made. Now, if they turn out to be not true—and there has not been on the facts such as to warrant a finding of continuity—then the results will be different. I am not going to preclude introduction of evidence. We have never had an evidentiary hearing, and I don't see why the defendants should be precluded from having one.

We had your representation, I think a couple affidavits back and forward. But nothing conclusive. You make a representation for purposes of pleadings. Your amendment is going to be allowed. If it turns out not to state the truth, why, then, you are in trouble.

Ms. DeBENEDICTIS: We also briefed the legalities of the issue as to why who owns the claim and if in fact the claim has transferred has nothing to do what profits and sales numbers were.

[8] THE COURT: It may have to do with the period of profits and sales to which you are entitled.

Ms. DeBENEDICTIS: I will leave that for the Court's decision after you have heard the evidence.

THE COURT: I think that would be an excellent idea.

Ms. DeBENEDICTIS: That is it, your Honor, and I am now prepared to make an opening.

THE COURT: All right.

MR. MATHEWS: Could we be heard for a moment on housekeeping or pretrial motions?

THE COURT: Sure.

MR. MATHEWS: We had planned to make some ad limine motions orally going to the question of the continuity of Allied Plywood Corporation with Allied International. I would understand from what has been said that you are not going to rule on that now.

I wonder if I could just put on the record what our motions would be?

We would move to preclude any evidence with respect to lost profits by Allied Plywood Corporation after the date of the acquisition. That is Allied's cause of action in its own right, as opposed to an assigned cause of action.

We would move to preclude any evidence with [9] respect to the eight nonparty corporations, who it appears the plaintiffs are going to seek damages on behalf of. Those are related corporations to Allied International who just never have been plaintiffs in this action, but somehow their sales have gotten lumped, at least into the discovery, into the calculations of damages.

THE COURT: Well, if they funnel into the plaintiff and the plaintiff lost revenue by that—

MR. MATHEWS: When you hear the evidence, I don't think that's the case.

THE COURT: If that's not the case, that's not the case. If it is the case, it is the case. It is up to the plaintiffs to prove it.

MR. MATHEWS: We would also move to preclude any evidence with respect to damages to Allied International, Inc., after the date it went out of business.

THE COURT: Well, I think that's right. Damages would go out, would go to whoever picked up the business, if they are shown to be related to this circumstance.

MR. MATHEWS: And, finally, we would move to preclude any evidence with respect to damages on the sale of non-Russian products which has crept into the discovery.

THE COURT: They have to tie it in.

You see, all this business, all this evidentiary business at the start of the trial is basically [10] a waste of time. I can't possibly rule on these matters until I hear the evidence. If they can, if the plaintiff satisfactorily ties in loss of revenue from other matters, for all I know, there may have been some connection between these sales and others. I suppose if they were

tied sales and violating antitrust laws, I doubt that they can claim, successfully claim, loss of profits of something of that kind. They can't profit from illegal conduct.

I don't know what is going to happen here.

MR. MATHEWS: I understand.

THE COURT: That's what we have trials for.

MR. MATHEWS: Right.

With respect to the plaintiffs ad limine motion with respect to collateral estoppel, we got their papers over the weekend, and if you are going to rule on this motion as a motion, we would like a chance to put in a response.

THE COURT: Sure.

MR. MATHEWS: I have our trial brief. We did not file it with the Clerk's Office today.

THE COURT: Send it up.

MR. MATHEWS: Finally, your Honor, we would like to move that during the course of the trial that all witnesses be excluded from the courtroom except the parties and their experts.

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 80-0584-S

ALLIED PLYWOOD COMPANY

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

SKINNER, D.J.

FIFTH DAY OF NONJURY TRIAL

APPEARANCES:

NUTTER, MCCLENNEN & FISH (by Attorney Danielle E. deBenedictis, Michael T. Cetrone, Esquire and Stephen Break, Esquire), 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiffs.

LAW OFFICES OF THOMAS W. GLEASON (by Charles R. Goldburg, Esquire, and Ernest L. Mathews, Jr., Esquire), 90 Broad Street, Suite 600, New York, N.Y., 10004, on behalf of the Defendants.

-and-

LECOMTE, BARBER, EMANUE'SON, TICK & DOYLE (by Joseph T. Doyle, Esquire), One Boston Place, Boston, MA 02108, on behalf of the Defendant.

Court of Appeals Courtroom
Federal Building
Boston, Massachusetts
Monday, October 21, 1985
9:15 a.m.

[5-11] MR. GOLDBURG: All right. Thank you.

THE COURT: He couldn't have made it more clear.

Now, do we want to press on with Mr. Gillis?

Ms. DeBENEDICTIS: I just have one thing in the nature of housekeeping, your Honor.

THE COURT: All right.

Ms. DeBENEDICTIS: I noticed in the back of the daily transcripts I am getting, although I had moved Exhibits 1 through 12, which are summaries of the various losses on the individual slips, although I moved them in, and I believe you have them all in front of you, somehow the transcripts shows only Exhibits 1, 6 and 12 were admitted.

THE COURT: I only show Exhibit 1 being admitted.

Ms. DeBENEDICTIS: I had moved Exhibits 1 through 12.

Could I move them now, if I didn't? Could I move them now?

THE COURT: Any objection to Exhibits 1 through 12?

MR. GOLDBURG: I have a couple of statements that I would like to make.

THE COURT: Never mind that. Do you have an objection to the admission of Exhibits 1 through 12?

[5-12] MR. GOLDBURG: Three of them, Judge, yes.

THE COURT: Which ones are they?

MR. GOLDBURG: I believe, Judge, Exhibit 10 refers to PROFESSOR RYBALTOVSKY—

THE COURT: That is what it says here.

MR. GOLDBURG: We would assert an objection to PROFESSOR RYBALTOVSKY on the grounds that that ship arrived in Montreal after the sale of assets. It was prior to the announcement of the end of the boycott, but it was after the sale of assets, and we take the position that any out-of-pocket claim on the RYBALTOVSKY would have accrued to Allied

Plywood rather than Allied International; and therefore, it would not pass, by virtue of the assignment from Allied to International, to Allied Plywood.

THE COURT: Well, it would have been a liability, would it not? If the out-of-pocket was owed, the new corporation picked up the liability of the old, did it not?

MR. GOLDBURG: I don't think it would be a liability. these are out-of-pocket expenses that were incurred after the sale of the assets, your Honor. Any liability would have accrued after the sale of assets.

THE COURT: That is all right. That is a loss to this plaintiff.

MR. GOLDBURG: But—I guess we can argue [5-13] that.

THE COURT: Your position, I have heard you allude to this, and I have a great deal of trouble with your position; but, rather than try to follow the ins and outs of the argument at this stage, I am going to admit the exhibit and then at the end, if you persuade me that I should not allow any damages on that ground, well, then I won't.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA. No. 80-0584-S

ALLIED PLYWOOD COMPANY

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

SKINNER, D.J.

TWELFTH DAY OF NONJURY TRIAL

APPEARANCES:

NUTTER, MCCLENNEN & FISH (by Attorney Danielle E. deBenedictis, Michael T. Cetrone, Esquire and Stephen Brake, Esquire), 600 Atlantic Avenue, Boston, MA 02110, on behalf of the Plaintiffs.

LAW OFFICES OF THOMAS W. GLEASON (by Charles R. Goldburg, Esquire, and Ernest L. Mathews, Jr., Esquire and Kevin Marrinan, Esquire), 90 Broad Street, Suite 600, New York, New York 10004.

and

LECOMTE, BARBER, EMANUELSON, TICK & DOYLE, (BY JOSEPH T. DOYLE, ESQUIRE), One Boston Place, Boston, MA 02108, on behalf of the Defendant.

Court of Appeals Courtroom
Federal Building
Boston, Massachusetts
Wednesday, October 30, 1985
9:45 a.m.

* * *

[12-79] Ms. DeBENEDICTIS: So shall we move on to the next motion?

THE COURT: Let's go on to the next one.

Ms. DeBENEDICTIS: Actually, your Honor, this is our response to their position to objecting to the scope of our claim, and we filed a motion in limine that said we wanted to preclude them from being able to attack the transfer of assets as being a cutoff date, et cetera, and, again, you said let's hear the evidence and we'll see what happens afterward.

I filed a brief with you on it before. I think it is very clear from the case law that when a company transfers its assets, even if it doesn't purport to transfer the claim, the claim is transferred with those assets. However, here in the paperwork we did transfer the claim. Allied International transferred the claim to APCO and APCO later on became Allied.

THE COURT: I think the issue is a little [12-80] more refined than that, because you started off with Allied International, and the only claims that were available to Allied International were Allied International's claims.

Now, when Allied Plywood is substituted and I allowed the amendment, and I don't think there is any problem with that, Allied Plywood Corporation, the new corporation, became the new plaintiff. And then a question comes about in relation to that, I suppose, because that amendment wasn't made until when, 19—

Ms. DeBENEDICTIS: It was made in the spring, your Honor.

MR. MATHEWS: June of '85.

THE COURT: June of '85. I don't know whether that was beyond the limitations period, whether the limitations period applied on a Section 301.

Ms. DeBENEDICTIS: I don't know, your Honor. I would have to check.

MR. MATHEWS: Well, that is an issue that is uncertain. There are petitions throughout.

Generally, you look to the analogous state law.

THE COURT: Six year statute?

MR. MATHEWS: Four year, damage to contract.

THE COURT: I thought it was a breach of [12-81] contract.

MR. MATHEWS: No. The usually analogy is to tortious interference. We have no contract with Allied.

THE COURT: That is true.

MR. MATHEWS: Tortious interference or damage to property. I think it is a four-year statute in Massachusetts.

THE COURT: No, it is not.

MR. MATHEWS: Three years. The boycott ended on June first or second, 1981, so they would have to bring their course by '84.

THE COURT: But we have a cause of action back to Rule 15.

Ms. DeBENEDICTIS: We filed our motion under 15(a), your Honor.

THE COURT: So it is a question of relation back, and it has to relate back generally to the basic claim that it was originally in the case.

Ms. DeBENEDICTIS: The claim has never changed, your Honor.

THE COURT: Yes, but the claim originally was that of Allied International and not that of the other Allied corporations, so for purposes of this case, I suppose an argument can be made that all that has been acquired by Allied Plywood

Corporation and all that is [12-82] carried forward now is the claim of Allied International for lost profits over the period, plus such claims for the period after the acquisition — well, I'm not sure about that. I suppose the question is whether the Allied Corporation can make a claim now for its loss of profits other than that attributable to the International branch for the period after the acquisition, and that depends upon whether that can be fairly related back to the date of the original complaint, and that depends upon whether the defendant was put on fair notice that that was a likely claim that was going to be made against them.

Isn't that how the sequence goes, something like that? Have I got the sequence right?

Ms. DeBENEDICTIS: I believe so, your Honor.

I think that in response to that argument, which is the second prong of their argument, that the business was always carried on the same. If you remember correctly, we had all the different Allied corporations prior to the business.

THE COURT: I know. But only one of them was a plaintiff here.

Ms. DeBENEDICTIS: That's correct.

THE COURT: That creates a problem for you.

[12-83] Ms. DeBENEDICTIS: Subsequent to the acquisition, financial statements refer to Allied Plywood Corporation and subsidiaries. But prior to the acquisition, the financial statements were always filed jointly, the financial statement of all Allied Plywood Corporation. They were treated as a whole financially.

THE COURT: Except they did not show up here as plaintiffs.

Ms. DeBENEDICTIS: I would argue in effect the claim certifying International was asserted on behalf of the whole group of Allied companies.

THE COURT: Does it say that anywhere in the complaint?

Ms. DeBENEDICTIS: I'll check it, your Honor.

THE COURT: I doubt it.

Okay. Press on.

Ms. DeBENEDICTIS: Upon the April, 1981 sale of assets, the branches became part of Allied Plywood Corporation, the present plaintiff. We represent to you that this was a unitary business that operated as a whole both prior to the April, '81 acquisition, and after the '81 acquisition. And we say that the new Allied Plywood Corporation succeeds to the branches' rights in the same way that it did to International's. [12-84] And we cite you a case on Page 12 of a brief that we're filing today which is National Homes Corporation versus Lester Industries. And there the Court said, "Where corporations are closely intertwined, Courts have recognized that one named as a party plaintiff has the right to protect both against wrongdoers."

So, your Honor, other than reading the brief, which we cite this case and another one with the same proposition, that is in essence my argument which has been the same since we tried to amend it under 15(a).

I think 15(a) takes care of the statute of limitations problem.

THE COURT: All right.

MR. MATHEWS: Well, your Honor, I think you have a handle on what the issue is. I just want to explain a few things for our position.

With respect to the eight known plaintiff corporations, the other Allied corporations you read that complaint, and you don't know they are in existence. You didn't know it; the First Circuit didn't know it; we never knew it until about 1983. How you can get a claim for them in there is beyond me.

It is a claim for Allied International who imports Russian wood. Nothing about the sale of domestic wood, nothing that they sell to their best—no [12-85] what they are doing here, your Honor. They are related corporations which are their

best customers, but they are also the plaintiffs in the action. They are the ones whose business they are supposed to have lost. It is crazy. They don't get it for the A corporation.

What they have is the cause of action that was assigned by Allied International along with the other assets that were acquired by Allied Plywood. And the real question is what is the scope of that cause of action? We say it doesn't encompass the other eight corporations, and we say that cause of action died as of the date of the sale.

Now, this may be merely a question of causation. If Allied International, the old Allied International, had no profits after April, '81, because Mr. Waldfogel elected to take the purchase price rather than continue in the wood business—Allied International, he testified, is still in existence. It is an investment company now; out of wood.

Let's say if you have a corporation, you might have International. Mr. Waldfogel decides he is tired of wood and wants to make his millions in TV. He discontinues the wood business and goes into it and he probably would make his millions in TV, but he can't then say it was the ILA boycott that kept him from having wood profits after he [12-86] decided to abandon that business. So our whole position is they have the assigned cause of action. International certainly has no claim on behalf of this new entity, which didn't even exist when they brought the suit, the damages that they lost.

Someone starts in the wood business in the middle of a boycott, you've got problems there,too. Didn't he jump in front of the speeding car? He knew there was a boycott. Or he took it into account on the price he paid that there was a boycott. They don't have any claim in their own right.

THE COURT: We have no evidence about the pricing, do we?

MR. MATHEWS: The pricing of the corporation, no, they didn't put it in.

THE COURT: You haven't put it in either that that was taken into account in pricing the wood.

MR. MATHEWS: No, we haven't. But the thing is, this, it is very clear, your Honor said, they do not in any way claim that the motivation for selling the assets was the ILA boycott.

THE COURT: No.

MR. MATHEWS: He couldn't stand it any more so he sold it. He did it for his own personal reasons. If he wants to elect to get out of the wood business, he [12-87] forfeited profits on the wood business.

THE COURT: He didn't elect to do it. He is very much in it.

MR. MATHEWS: He went to the new entity and got the job. Allied International, the plaintiff in this case, who assigned the cause of action, whose parameters we're examining got out of the wood business and went into the investment business.

[12-88] THE COURT: They assigned the cause of action.

MR. MATHEWS: That cause of action is only Allied International's cause of action. Let's say there had been no assignment and Allied just went out of business in April of 1981 and went into investment, sold its assets off, one warehouse there and one warehouse there, just went out of business. Could it come in and say, "Oh, we didn't go out of business because it was your fault. We had no profits from the sale of wood. Of course, they don't. Now they're an investment. So we say that the loss of profits after 1981 is no part of the assigned cause of action which is the only cause of action before this Court.

Therefore, it's much too late to preclude evidence. But that they cannot recover for lost profits after the date of the sale.

THE COURT: Unfortunately, this business of collective corporate structures is usually dictated by the tax man and hasn't much to do with anything else.

MR. MATHEWS: But—

THE COURT: It was typical for an organization to set up all these separate corporations before the Tax Reform Act of 1969, I think it was, because then they could all, they could split the income and break things down. And after the Tax Reform Act of 1969, I have been [12-89] trying to get my clients to consolidate, and they thought they had been so smart with all these wonderful corporations, it took the lawyers five or six years to persuade them to do what Allied did and get rid of all this nonsense.

MR. MATHEWS: But wait.

THE COURT: This was the sort of thing that went on all the time. If we tried to substitute all of this corporate hanky-panky for whatever, for the real flow of the economic interests here, I think we are going to get in an awful mess.

MR. MATHEWS: I'm talking about the distinction between Allied International and Allied Plywood. Allied International was owned by Waldfogel and Gilday. Allied Plywood is owned 85 percent by someone else. It's not just a change of operation. It's a whole new corporation.

Along the lines that I said, when people did do this for tax reasons, and I can recite it, if you want to do it for those reasons, you're stuck with it.

THE COURT: Okay.

Ms. DeBENEDICTIS: Your Honor, on this point, about whether or not the transfer was accomplished of the claim as of the date of the acquisition, I think there is no doubt you're absolutely right. There is case law. I have several cases in my brief. There doesn't have to be a unity. It would have been accomplished even if [12-90] Mr. Waldfogel and Mr. Gilday were not 20 percent stockholders in the new Allied Corporation. It's a red herring that Allied International still exists as an investment company. Again, the cases say that has nothing to do with anything. What has to do with the question is what the transfer—did the transfer of the claim take place? And the

cases even go as far as saying it doesn't have to be a transfer of the claim in writing the way there was here.

THE COURT: I'll take it under advisement.

MR. MATHEWS: Could I have one more point?

Let's just imagine they didn't assign that cause of action but that Allied International, as one of its investments, invested in this lawsuit of what we can get from the ILA. They sold the other assets. Plywood is operating the wood business but International is pressing this lawsuit.

Now, I don't think in that circumstance, you would hear evidence of Plywood's losses.

You say to International, Show your losses. They show them up to '81, and then they had no more losses because at that point they went into the investment business.

THE COURT: Is that it?

Ms. DeBENEDICTIS: Can I say just one thing?

I want to direct your attention to under [12-91] 15A, there has been no change here in the essential nature of the lawsuit by the amendment. That is all. Basically, it hasn't changed the evidence.

THE COURT: That is the question.

Thank you very much.

Ms. DeBENEDICTIS: Thank you.

(3)

No. 86-1858

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

I

Respondent twice represents to this Court that petitioners, as defendants in the district court, never answered or otherwise responded to the amended complaint served on behalf of Allied Plywood Corporation ("Plywood"). Respondent's Brief In Opposition ("RB") at 3, 9. In fact, the defendants served their answer to the amended complaint on July 1, 1985. A copy of that answer appears at page 45a *et seq.* of the Joint Appendix in the court of appeals, App. 6-12, with its accompanying certificate of service at page 51a. App. 12. It is listed on the first page of the table of contents of the Joint Appendix. App. 2. The district court's docket sheet, reproduced at page 6a of the Joint Appendix in the court of appeals, also notes

the filing of the answer to the amended complaint as Nr. 123 on page 4. App. 4.[1]

In view of this documentation and of respondent's participation in the preparation of the Joint Appendix in the court of appeals, there can be no excuse or justification for respondent's misrepresentations to this Court. More important, the suggestion for which the untrue statement is offered as a predicate—the claim that petitioners were not denied their constitutional rights to assert defenses and to demand a jury trial—is untenable.

Petitioners did serve an answer to the amended complaint. Since petitioners were misled by the district court's handling of the motion to amend, their answer to the amended complaint was identical to their answer to the original complaint, with the exception of a single denial in Paragraph 2 (that Plywood is a Massachusetts corporation). App. 6. The answer to the amended complaint does not contain defensive material that would have been available against Plywood. See Petition at 11, 12. Petitioners had been led to believe that the amended complaint did no more than assert the cause of action assigned to Plywood by Allied International, Inc. ("International"). In that situation, defensive material that was available against Plywood but not against the assignor, International, in whose shoes Plywood stood, was irrelevant and does not appear in the answer.

Respondent's quotations from the June 12, 1985 hearing, RB at 8, n.1, do not undermine petitioners' showing of prejudice. The district court's remarks in no way resolve the ambiguity, since, if the amendment was solely to sub-

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[1] The cited pages from the Joint Appendix in the court of appeals are reproduced as an appendix to this reply brief and are cited "App. —".

stitute Plywood as assignee, Plywood would still have the "recoverable interest" or the "continuity of interest" the district court alludes to. Quoting the district court's remarks does not change the fact that at the hearing the court labelled the suggestion that Plywood was asserting anything other than the assigned claim, "Bananas" and then, after trial, awarded over $6 million for damages not included in the assigned claim. Nor does respondent deny or overcome the facts that, when petitioner moved for clarification, so as to prepare a proper defense against any claim Plywood might be asserting on its own behalf, respondent assured both the court and petitioners that Plywood was asserting only the same cause of action asserted by International, and the district court did not modify its original view that all the amendment "does is change the name of the plaintiff." Appendix C to Petition at 30a.

Similarly, the colloquies from the trial transcript that appear as appendices to Respondent's Brief in Opposition fail to dispell the prejudice to petitioners. In each instance, the colloquy shows that petitioners were proceeding on the theory that what was at issue was the claim assigned to Plywood by International, not a claim in Plywood's own right. Consequently, petitioners consistently argued that damages accruing after the sale of assets were not recoverable by International and so could not form part of the assigned claim. See RB at A-3, A-6-A-7, A-12-A-15.[2]

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[2] To the extent that the court of appeals held that International's claim, the assigned claim, could encompass damages for profits "lost" after International's voluntary sale of its assets, the First Circuit is in clear conflict with the Fifth and other circuits. *See* Petition at 15-16. Respondent's attempt to distinguish all the reported authority on the basis that here only lost profits were sought, rather than both lost profits and diminished sales price, is obtuse. Lost profits and diminution of sales price are two ways of calculating the same harm. Where, as here, a seller receives full value for its assets, there is no harm at all.

Respondent's attempt to perpetuate the canard that this case involves merely a straightforward application of Fed. R. Civ. P. 15, RB at 4-7, runs into a stone wall. If the amended complaint asserted no more than the assigned claim, no consideration of the "relation back" doctrine of Rule 15(c) would have been necessary. That the district court, the First Circuit, and now respondent were all impelled to undertake a relation back analysis proves that more was involved in the post-trial decision than the simple substitution of plaintiffs envisioned when leave to amend was granted.

The reiterated apology that the original complaint sought damages on behalf of International for the same time period for which damages were ultimately granted to Plywood is a deliberate evasion. The critical factor that created prejudice was not the time period but the identity of the injured party. Petitioners had defenses that were available only against Plywood, not International. By the shrouding of the identity of the plaintiff until after trial, petitioners were prevented from asserting those defenses, just as they were prevented from demanding a jury trial which would be available only if a new claim was also being asserted.

Respondent's efforts, then, only serve to underscore the extent to which petitioners were prejudiced. Having been told by both the court and their adversaries that the amended complaint only included the assigned claim, petitioners prepared and tried the case accordingly. They did not demand a jury trial because they had already waived that right with respect to the assigned claim. They did not plead or present defenses available against Plywood because those defenses would not apply to an assigned claim. Then, after trial, the district court awarded damages on the theory that the amended complaint asserted

not only the assigned claim but also a claim on Plywood's own behalf. For the First Circuit to permit recovery on a claim that was not merely unmade but actually disclaimed by plaintiff and the district court was a departure from norml judicial practice and a perversion of the Federal Rules amounting to a deprivation of constitutional rights, which cries out for correction by this Court.

II

The new material included in respondent's appendices also serves to underscore petitioners' demonstration of the conflict between the First Circuit's decision and the holdings of other circuits. Respondent urged to the district court the theory that the only continuity necessary is that "of the business". RB at A-12. The same notion was urged to the First Circuit and now to this Court. "As the district and circuit courts found, the Russian wood importing business never ceased, nor was it even altered. Rather, the business was transferred to a new owner and continued operation as before." RB at 11.

Respondent admits that the First Circuit upheld recovery on the basis of continuity of the business operation, not continuity of ownership. RB at 12. As pointed out in the petition, this ruling conflicts with the holdings of all circuits in every context but one. See Petition at 17-18. The kind of "identity" found by the court of appeals here has been utilized only to impose products liability on a purchasing corporation —an approach antithetical to well established labor law policies. See Petition at 18-19.

The First Circuit's decision necessarily involves an interpretation of Labor Management Relations Act § 303(b), 29 U.S.C. § 187(b), under which this case is brought. If harm to the business itself, as opposed to the legal entities which own and operate the business, will suffice for dam-

ages under § 303, the statutory language which grants a cause of action to "one who is injured in his business" undergoes a radical expansion. The ramifications for all organized labor need not be elaborated upon. Scrutiny by this court is required before any such novel and alien interpretation of federal labor law be accepted.

CONCLUSION

For the foregoing reasons as well as for the reasons set forth in the petition, a writ of certiorari to review the judgment and decision of the Court of Appeals for the First Circuit should be granted.

Dated: July 1, 1987

Respectfully submitted,

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Of Counsel:

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APPENDIX

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 86-1947

ALLIED INTERNATIONAL, INC.,
Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO.
Defendant-Appellant.

No. 86-1987

ALLIED INTERNATIONAL, INC.,
Plaintiff-Appellee,

v.

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOINT APPENDIX

(Volume I—Pages 1a to 881a)

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UNITED STATES COURT OF APPEALS

For the First Circuit

No. 86-1947

Allied International, Inc.,

Plaintiff-Appellee,

v.

International Longshoremen's Association, AFL-CIO,

Defendant-Appellant.

No. 86-1987

Allied International, Inc.,

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v.

Local 799, International Longshoremen's Association, AFL-CIO,

Defendant-Appellant.

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[6a]

District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1984		
Feb 9		SKINNER, D.J., re: #104 "Objection overruled. Request for hearing denied," entered, cc/cl.
1985		
May 2	105	Ps supplemental response to Ds 2nd set interrogatories, c/s.
29	106	Pltf's Mtn to compel Defts to supplement their answers to expert Intgs concerning Michael L. Selar and John Muench or, in the alternative, to limit and preclude expert testimony at Trial, filed, c/s.
29	107	Pltf's MEMO in support of #106, filed, c/s.
Jun 4	108	Deft's MEMO in Oppo to Pltf's Mtn to Compel, filed, c/s.
11	109	Deft's Mtn for Order to Compel Discovery, filed, c/s.
11	110	Affid in support of #109, filed, c/s.
11	111	Deft's Mtn for further Discovery concerning Expert Witness, filed.
11	112	Deft's MEMO in support of #111, filed, c/s.
12	113	Pltf's Mtn to Amend Complaint, filed, c/s.
12		Case ref to USM COHEN for all pending Mtns.

District Court Docket Sheet

DATE	NR.	PROCEEDINGS
12	114	SKINNER, D.J., SCHEDULING ORDER, All pending discovery Mtns are to be referred to the Magistrate for expedited action. All discovery will be completed within thirty days after the magistrate's Order on said mtns. The case is set for a pretrial conference on 7/29/85 at 2:00 p.m., entered, cc/cl.
13	115	COHEN, USM, PROCEDURAL ORDER, To the extent that such mtns are pend counsel for the moving party with respect to such mtns shall, by letter filed on or before 6/19/85, identify those mtns by name and docket number assigned by the Clerk. A hearing shall be held on those mtns on 6/25/85 at 2:00 p.m., entered, cc/cl.
19	116	Pltf's respnse to Deft's subpoena of 6/6/85, filed, c/s.
21	117	Pltf's response to Deft's Mtn for Order to Compel Discovery, filed.
21	118	Pltf's MEMO in Oppo to Deft's Mtn for further Discovery concerning expert witness, filed, c/s.
24	119	Deft's fourth Set of Intgs, filed, c/s.
25	120	Pltf's Mtn for Protective Order, filed, c/s.
26	121	COHEN, USM, ORDER, entered, cc/cl.
Jul 1	122	Pltf's Reqs for Admissions, filed, c/s.
5	123	Defts' Answer to Amended Complaint, filed, c/s.

District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
Jul 5	124	Amended Notice to Take Depo of Allied Plywood on 7/15/85, filed, c/s.
5	125	Deft's Third supplemental Answers to Pltf's Intgs, filed, c/s.
5	126	Deft International Longshoremen's Mtn for Reconsideration, filed, c/s.
5	127	Deft's MEMO in support of #126, filed, c/s.
8	128	Pltf Allied Plywood's response to Questions posed at the Depo of Morton Waldfogel on 5/22 and 5/23/83, filed, c/s.

Answer to Amended Complaint

[45a]

(pp. 45a-51a)

UNITED STATES DISTRICT COURT

District of Massachusetts

Civil Action No. 80-584-S

Allied Plywood Corporation,

Plaintiff,

v.

International Longshoremen's Association, AFL-CIO, et al.,

Defendants.

Answer to Amended Complaint

Defendants, by their attorneys, Doyle & Doyle and Thomas W. Gleason, answer plaintiff's amended complaint as follows:

1. As to paragraph 1 of the amended complaint, defendants admit that plaintiff is attempting to assert a cause of action under §303 of the Labor Management Relations Act, admiralty tort, and the Sherman and Clayton Antitrust Acts. Defendants deny that plaintiff has a cause of action under said statutes, under admiralty tort, or under any other rule of law.

2. Paragraph 2 is admitted, except defendants deny that plaintiff Allied Plywood Corporation is a Massachusetts corporation.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted, except defendants deny that Thomas W. Gleason can be sued in his individual capacity by plaintiff.

[46a]

6. Paragraph 6 is admitted, except defendants deny that H.R. Hasselgren can be sued in his individual capacity by plaintiff and deny that H.R. Hasselgren is Secretary-Treasurer of the ILA.

7. Paragraph 7 is admitted, except defendants deny that John Bowers can be sued in his individual capacity by plaintiff.

8. Paragraph 8 is admitted, except defendants deny that Fred R. Field, Jr. can be sued in his individual capacity by plaintiff and deny that Fred R. Field, Jr. is General Organizer of the ILA.

9. Paragraph 9 is admitted, except defendants deny that Anthony Scotto can be sued in his individual capacity by plaintiff, and deny that Anthony Scotto is Regional Director of the ILA.

10. Paragraph 10 is admitted, except defendants deny that J.T. Moock can be sued in his individual capacity by plaintiff.

11. Paragraph 11 is admitted, except defendants deny that R.A. Massey can be sued in his individual capacity by plaintiff. Defendants affirmatively state that R.A. Massey is deceased.

12. Paragraph 12 is admitted, except defendants deny that George Dixon can be sued in his individual capacity

by plaintiff. Defendants affirmatively state that George Dixon is deceased.

[47a]

13. Paragraph 13 is admitted, except defendants deny that W.P. Lynch can be sued in his individual capacity by plaintiff.

14. Defendants admit that plaintiff is attempting to invoke the court's jurisdiction under 29 U.S.C. §187, 28 U.S.C. §133, and 15 U.S.C. §§1 and 15. Defendants deny that plaintiff has a cause of action under said sections or under any other rule of law.

15. Paragraph 15 is denied.

16. Paragraph 16 is denied.

17. Paragraph 17 is denied.

18. Paragraph 18 is denied.

19. Paragraph 19 is denied.

20. Paragraph 20 is denied.

21. Paragraph 21 is denied.

22. Paragraph 22 is denied.

23. Paragraph 23 is admitted except defendants object to the characterization of the January 9, 1980 telegram as a "directive."

24. Paragraph 24 is denied.

25. Paragraph 25 is denied.

26. Paragraph 26 is denied.

27. As to paragraph 27, defendants admit that the refusal of longshoremen to service Russian ships or handle

Answer to Amended Complaint

Russian cargo received some publicity but deny that they encouraged publicity or that the publicity was widespread.

[48a]

28. Paragraph 28 is denied.

29. Paragraph 29 is denied.

30. Paragraph 30 is denied.

31. Paragraph 31 is denied.

32. Paragraph 32 is denied.

33. Paragraph 33 is denied.

34. Paragraph 34 is denied.

35. Paragraph 35 is denied.

36. Paragraph 36 is denied.

37. Paragraph 37 is denied.

38. Paragraph 38 is denied.

39. Paragraph 39 is denied.

40. Paragraph 40 is denied.

41. Paragraph 41 is denied.

42. Paragraph 42 is denied.

43. Paragraph 43 is denied.

44. Paragraph 44 is admitted.

45. Paragraph 45 is denied to the extent that it repeats and realleges allegations which have been denied above.

46. Paragraph 46 is denied.

47. Paragraph 47 is denied.

48. Paragraph 48 is denied.

Answer to Amended Complaint

49. Paragraph 49 is denied.

50. Paragraph 50 is denied to the extent that it repeats and realleges allegations which have been denied above.

51. Paragraph 51 is denied.

[49a]

52. Paragraph 52 is denied.

53. Paragraph 53 is denied to the extent that it repeats and realleges allegations which have been denied above.

54. Paragraph 54 is denied.

55. Paragraph 55 is denied.

First Defense

56. The complaint fails to state a claim upon which relief can be granted.

Second Defense

57. The alleged conduct complained of by plaintiff arises or grows out of a labor dispute, and this court therefore lacks jurisdiction to issue any restraining order or temporary or permanent injunction with respect to such conduct.

Third Defense

58. The wood products which plaintiff allegedly sought to import into the United States were produced by forced labor. The importation and transport in interstate commerce of such products is unlawful. 19 U.S.C. §1307. Plaintiff is barred from seeking any relief in law or equity, by reason of defendants' refusal to handle such products.

Answer to Amended Complaint

Fourth Defense

59. The court does not have personal jurisdiction over Defendants Thomas W. Gleason, Harry R. Hasselgren, John Bowers, Fred R. Field, Jr., Anthony Scotto, James T. Moock, R.A. Massey, George W. Dixon, or William P. Lynch.

[50a]

Fifth Defense

60. The complaint is barred by the statute of limitations.

Sixth Defense

61. Plaintiff lacks standing to bring the action.

Seventh Defense

62. Plaintiff's admiralty tort and antitrust claims (counts II and III) are barred by law of the case, having previously been dismissed by this court.

WHEREFORE, defendants respectfully request the court to dismiss the amended complaint with prejudice and to award defendants the costs and disbursements of this action, together with such other and further relief as to the court may seem just and proper.

Answer to Amended Complaint

Dated: July 1, 1982

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Counsel for Defendants

[51a]

CERTIFICATE OF SERVICE

CHARLES R. GOLDBURG, an attorney associated with the Law Offices of Thomas W. Gleason attorney for defendants hereby certifies that on July 1, 1985 he mailed a copy of the foregoing Answer To Amended Complaint to Nutter, McClennen & Fish, Federal Reserve Plaza, 600 Atlantic Avenue, Boston, MA 02210, counsel for plaintiff.

/s/ CHARLES R. GOLDBURG
CHARLES R. GOLDBURG